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If this book is lost, may we hope
to God! that it falls in our honest
man's hands.

The honest man, Bill,
was your abiding servant,
J. W. Churchill.
(P.S. I stole it from C.W.C.)



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THE
LAW OF THE PRESS

TEXT, STATUTES, AND CASES

BY
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PREFACE

THIS book is the fruitage of a course of lectures which the author has given successively in two schools of journalism. The materials have been collected through necessity, not through choice. A few pamphlets and one or two brief books, devoted mainly, if not exclusively, to the law of libel, have constituted the only specific contributions of American law writers to the field of journalism. An English volume by Paterson, entitled "Liberty of the Press, Speech and Public Worship," is more comprehensive and scholarly than any of the American books; but it was published in 1880, and is now almost unobtainable. Moreover, it is not adapted to present-day needs in the United States.

In determining the scope of the subject-matter to be presented under the title "The Law of the Press," the author has from the outset tried to approach his task from the standpoint of the journalist, both in embryo and fully matured. His experience as a lawyer recalled to his mind the presence of the ubiquitous cub reporter in and about the courthouse. Chapter II, on Law, Courts, and Legal Procedure, was written for his benefit, first, that he might the more easily locate and more accurately report the doings of the courts; and, second, that he might then and later better appreciate the law of privileged reports.

The law of libel the journalist has always with him. It follows him to the grave and lives after him to plague his estate.

An all too prevalent practice of deciding pending cases before the courts are through with them subjects the journalist to penalties for contempt of court.

The law relative to the unauthorized use of photographs is just in process of development under the title Right of Privacy. Perhaps newspaper publishers would care to participate in defining its limits.

Freedom of the press is of profound interest, not only to journalists, but to all mankind. For a hundred years the subject, in its more important phases, lay dormant. Since the Great War, it, together with its bedfellow, freedom of speech, has been more thought about, more written about, and more frequently before the courts, than in all the previous history of the nation. The problems it presents are not solved. The line between liberty and license has not been drawn. Where it is drawn augurs good or ill for the future.

In collecting the various statutes, both state and federal, that pertain to the press, it is conceived that a work of interest and practical value has been done.

The law pertaining to news-gathering agencies, copyright, official newspapers, and contracts between the publisher and his subscribers and advertisers, is set forth simply, but with reasonable completeness.

For a further statement concerning the aims, scope and plan of the work, the reader is referred to Chapter I, entitled Introduction, and to the introductory paragraph of Chapter III, where explanations are offered that might appropriately have been included in this preface.

Acknowledgment is gratefully made to Professor H. F. Harrington, formerly head of the Department of Journalism of the University of Illinois, now head of the Joseph Medill School of Journalism of Northwestern University, and to Dean Eric W. Allen, of the School of Journalism of the University of Oregon, for examining the manuscript from time to time, and for valuable suggestions as to method of treatment.

WILLIAM G. HALE.

UNIVERSITY OF OREGON LAW SCHOOL,
April, 1923.

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THE LAW OF THE PRESS

CHAPTER I INTRODUCTION

"The Law of the Press."—Without explanation this title may prove misleading. Speaking with technical exactness, there is no body of law which may be called the "Law of the Press." The law of torts, the law of crimes, the law of contracts, constitutional law, and so on, which are distinct branches of the law, apply with equal force to all persons or groups of persons. Except for a few statutes, those engaged in journalism in any of its phases are not singled out for special legal favors or restrictions. There are, however, certain branches or subdivisions of the law with which journalists, by reason of the special scope of their activities, come into more frequent contact than they do with others, and which may, therefore, be grouped and considered for their special benefit. The law of libel and the clauses of the federal and state Constitutions which prohibit the passage of laws restricting the freedom of speech and of the press, are apt illustrations.

Aim, Scope and Method of Treatment.—The purpose of the pages which follow is, first, the very practical one of giving the journalist that particular legal knowledge which he needs in order the more efficiently, accurately, and wisely to discharge his reportorial duties. These duties include reports of the daily doings of the courts. To locate a matter that has been taken into the courts, to be able to follow it through its legal course intelligently, to translate the story of the courtroom into language capable of being understood by the general reading public, and withal accurately, requires of the reporter a knowledge of the organiza-

tion and jurisdiction of the courts, of legal procedure and legal terms, far beyond that of the average layman. It is to fill this need that chapter II has been devoted to law, courts, and legal procedure.

As a reporter, editor, or publisher there is also a real need for a thorough knowledge (1) of the law of libel; (2) of the law pertaining to contempt of court growing out of comments upon pending or completed litigation; and (3) of the various statutes, both federal and local, curbing the press in the matter of content and distribution, in order that he may not himself become the chief actor in a court proceeding as distinguished from an interested reportorial observer. These subjects, apart from statutes, are presented by means of combined text and reported decisions. The cases, it is believed, will not only aid the understanding and memory of the law, but will serve further to familiarize the reader with the workings of our courts.

Finally, an understanding of the law of copyright is of obvious practical value to the reporter, not only in enabling him to avoid unlawful infringements of the rights of others in their literary property, but also in securing for himself the benefits of his own literary productions. The other topics noted are deemed of interest but of somewhat minor importance.

It has been said that these practical aims were the chief ones. It is hoped, however, that there will be a large by-product from the study in the form of a greater appreciation of our laws and legal institutions as a result of the better understanding of their purposes and functioning. With all their imperfections, they are the bulwarks of human liberty. As such they are to be improved upon with a wisdom born of understanding, not flouted and condemned. Newspapers can render no larger service to-day than to wield their great influence, both by precept and example, in season and out of season, in creating and maintaining a wholesome respect for law and order.

CHAPTER II

LAW, COURTS, AND LEGAL PROCEDURE

SECTION 1.—NATURE, SOURCES, AND CLASSIFICATION OF LAW

Law Defined.—Law is commonly defined as a rule of conduct enforced by the power of the state. It is the fact that the government will lend its aid in the enforcement of rules of law that in the last analysis distinguishes them from ethical or other rules of conduct. The latter depend for their enforcement only upon conscience and the power of public opinion. If a stranger should refuse to throw a rope, which was conveniently at hand, to a drowning person, his offense would be against ethics, not against law. He would be morally condemned, but he would not be a criminal. No law requires one to be a Good Samaritan. But if the helpless person were a child, and the one who refused aid were the child's nurse, the law would condemn the act of refusal, and the state would punish the nurse as a legal offender. While the law uniformly provides that no one shall, through active culpable misconduct, cause harm to another, it is only where a special relationship or voluntary undertaking exists that it requires affirmative steps to be taken to rescue another from peril or suffering. In the eyes of the law it is one thing to push a man into the lake, and quite a different thing to refuse to rescue one who has fallen into it. The rule of conduct which governs the one case is legal; the rule which ordinarily applies to the other is moral.

Sources and Classifications of Law.—All law is either of statutory or common-law origin. Roughly speaking, statutory law is written; the common law is that which is unwritten. In the United States, the legislative or written law emanates from Congress and from the various state Legislatures in the form of statutes, and from city councils

in the form of ordinances. The rules of the common or unwritten law are judicial formulations, chiefly of the crystallized customs and the moral sense of the community, tempered by the judge's rational sense of abstract justice and practical expediency. This is at least true of the common law in its earliest stages. But when, upon these principles, a given case is decided, that decision becomes at least of advisory force to a later court, when called upon to pass upon a similar set of facts. Wherefore the general practice to-day is to turn to prior opinions of the courts to determine the rules and principles of the common law, even going in the search to the earliest reported cases in England.

A Further Classification.—Our law is further divided into criminal and civil law. A criminal wrong, or crime, is an offense of which the state, as such, takes special cognizance by punishing it. It does this on the theory that, while the act may affect an individual, it is also in a peculiar sense a wrong against the public. This idea is emphasized in the formal charge of crime, such as an indictment or information, which always concludes with the statement that the act was against the peace and dignity of the state.¹

¹ Crimes may be classified, first, as treasons, felonies, and misdemeanors; and, secondly, apart from treason, as crimes (1) against the person; (2) against property; (3) against morality and decency; (4) against public justice and official duty. These latter headings will cover all the common-law offenses and the more common statutory offenses, but not all of the acts which have been made criminal by statute in the various states.

Treason.—Treason is a breach of allegiance. The Constitution of the United States provides that treason against the United States "shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

Felonies.—At common law, a felony, it is usually said was any offense which was punishable by the forfeiture of lands or goods. The punishment included in addition, in many cases, the death penalty. To-day, by statute in many states, felonies include all crimes punishable by imprisonment in the state penitentiary.

Misdemeanors.—All offenses below the grade of felony are misdemeanors.

Crimes Against the Person.—Murder; manslaughter; rape; assault; battery; false imprisonment.

Crimes Against Property.—Arson; burglary; larceny; knowingly receiving stolen property; embezzlement; forgery; counterfeiting; malicious injury of property.

Crimes Against Morality and Decency.—Adultery; polygamy; lewd cohabitation; seduction; indecent exposure; maintaining or frequenting houses of prostitution; incest; sodomy; gambling.

Crimes Against Public Justice and Official Duty.—Perjury and sub-

In contrast with a crime, a civil wrong is looked upon primarily from the standpoint of the individual who has suffered harm. The judgments rendered in the two classes of cases reflect these variant points of view. In the criminal case, for example, the judgment, such as fine, imprisonment, or death, is inflicted as a punishment, and is imposed in part at least to deter, not only the offender, but others, by the force of example, from repeating such acts; while in the civil case the judgment is for the purpose of giving personal relief to the individual damaged. In the one case the state is the party plaintiff; in the other, the injured person. For example, in a criminal action the case is entitled *United States, or State (or People, or Commonwealth), against Jones*; and in a civil proceeding, *Smith against Jones*.

The law of libel, which we shall cover fully in a later chapter, falls under both the criminal branch of the law and a special subdivision of the civil branch known as torts. On the one hand, libeling a person results in depriving him of his good reputation. Since reputation is a thing of value, truly rather to be chosen than great riches, a damage to it is a personal wrong. To redress this personal wrong money damages should be paid to the injured person. On the other hand, the publication of defamatory statements tends strongly to induce a breach of the peace by the person defamed, and hence is of peculiar moment to the state as the guardian of the public peace. Viewed from this angle, libel is a crime, and as such subjects the offender to a fine or imprisonment.

Common Law and Equity.—While, as indicated previously, the term “common law” is used in contradistinction to statute law, it is also used to distinguish the body of law administered in the common-law courts, so called, from that administered in courts of chancery or equity. Common-law relief is generally in the form of damages, whereas in equity

ornation of perjury; bribery, or offering to bribe, or receiving or offering to receive a bribe; officer voluntarily or negligently permitting a prisoner to escape; malfeasance in office.

Reasonably adequate definitions of these crimes may be found in any law dictionary, such as Black, Bouvier, or Words and Phrases, and in the statutes of the various states.

the wrongdoer is required by a decree of specific performance or injunction to do or not to do certain acts.

SECTION 2.—ORGANIZATION AND JURISDICTION OF THE COURTS

The United States judicial system is divided broadly into the federal and state systems of courts. The federal courts are the Supreme Court of the United States, the United States Circuit Court of Appeals, and the United States District Court.² The jurisdiction of the federal courts is determined by the United States Constitution and by acts of Congress.

The United States Supreme Court.—The jurisdiction of the Supreme Court is chiefly appellate, but to a limited extent it also has trial court jurisdiction. It is provided in the federal Constitution that the Supreme Court shall have original (trial court) jurisdiction in all cases affecting ambassadors, other public ministers, and consuls, and in certain enumerated classes of cases in which a state shall be a party.³ The appellate jurisdiction of the Supreme Court is in the main over the courts in the federal system. Some cases may be taken to it for review directly from the District Court, which stands at the bottom of the federal system of courts, while other cases must be carried first to the United States Circuit Court of Appeals. With greater or less re-

² Article 3, § 1, U. S. Constitution: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. * * *"

Pursuant to this authority Congress has established the District Court, the Circuit Court (the latter being abolished January 11, 1912), and the Circuit Court of Appeals. There are nine circuits, with a Circuit Court of Appeals in each, holding sessions as provided by the Judicial Code and at such other times and places as the judges of the circuit may provide. The District Courts are numerous, there being, for example, three judicial districts in the state of Illinois, called, respectively, the Northern, the Eastern, and the Southern. See Bunn, U. S. Courts, p. 5.

³ A typical case of the latter sort is a case where two states are in controversy over a boundary.

strictions they may then finally be taken to the Supreme Court.

The United States Supreme Court also has appellate jurisdiction to a limited extent over the highest courts of the states. Where a decision of the highest court of a state is against a right set up under the United States Constitution, or a treaty, or an act of Congress—that is to say, where the state court's decision is adverse to the federal law—the defeated party may of right take the case to the Supreme Court of the United States. Also if the decision of the state court is in favor of such right or law, the case may, by first securing special permission of the United States Supreme Court, be carried up. Ordinarily, if the United States Constitution, or a United States treaty or law, is upheld by a state court, the case will go no higher, and under no circumstances can a case be carried further unless some federal question is involved.

The United States Circuit Court of Appeals.—The jurisdiction of this court is exclusively appellate, and is confined to cases which have been initiated in the United States District Court. It has no trial court jurisdiction, and under no circumstances hears appeals from the state courts. Certain classes of cases reviewed by the Circuit Court of Appeals may of right be carried on to the Supreme Court. In other cases the permission of the Supreme Court must first be obtained before a further review can be had. Since the Circuit Court of Appeals was created for the purpose of relieving the Supreme Court of the burden of reviewing all appealed cases, it follows that ordinarily cases decided by the appellate court will go no higher.

United States District Court.—The District Court is exclusively a trial court, otherwise called a court of first resort, or of original jurisdiction, in the federal system. It has jurisdiction of such causes, falling within the judicial power of the United States, as has been granted to it by federal statute. Its jurisdiction is in general made to turn either upon the character of the parties or the subject-matter of the controversy, but in some instances upon the further fact of the amount involved.

It is provided thus that it shall have original civil jurisdiction of all suits brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states; also of suits where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws or treaties of the United States, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects.

It should also be noted that in most of the cases above enumerated the state courts have concurrent jurisdiction with the federal courts. The exclusive jurisdiction of the federal courts is restricted, indeed, to a very limited field. By concurrent jurisdiction is meant that the plaintiff at his option may bring his case either in a state court or in the United States District Court. In most of such cases, however, the defendant, if sued in a state court, may at his option secure the removal of the case to the federal court. Where the suit is between citizens of different states, the right of removal is restricted to the case where the defendant is a nonresident of the state in which he has been sued.

The exclusive jurisdiction of the federal courts is over suits relating to patents, copyright, in admiralty, and prize; over penalties, forfeitures, and seizures under the police regulations of the federal government relating to food, drugs, animals, plants, and seeds; over bankruptcy matters;⁴ over

⁴ A further word about bankruptcy will be of interest to the news gatherer. By virtue of the United States Bankruptcy Act a person who is unable to meet his obligations may file a petition in the United States District Court to be adjudicated a bankrupt. If his petition is granted, all of his assets, with the exception of a limited amount which the law allows him to exempt, are turned over to a trustee in bankruptcy, and, under the supervision of the referee in bankruptcy, are distributed pro rata amongst the creditors of the bankrupt. If the case is faithfully and honestly carried through, the bankrupt may then receive his discharge. The practical effect is that, even though the assets may only have been sufficient to pay the creditors one cent, or nothing, for that matter, on the dollar, his obligations are legally discharged in full, and he is free to start in business again, unhampered by suits of creditors. The proceedings may be, and are at times initiated by a creditor in order to pre-

prosecutions for crimes growing out of violations of federal statutes;⁵ through habeas corpus and appeal over some questions connected with immigration and Chinese exclusion; and over a limited number of other cases arising under federal laws.

State Courts.—The number and characterization of the courts in the several states vary to some extent, but commonly they consist of a single Supreme Court, which has chiefly appellate jurisdiction, and of a district, circuit, or superior court, a county court, a probate court, and several justice of the peace and police magistrate courts in each county.

In the densely populated counties the number of judges who preside in the district, circuit, or superior court is increased, and the court is subdivided in departments; whereas, in sparsely settled counties, one judge may preside in such courts of two or more counties. It was from this latter practice, which was universal in early times, that the circuit court got its name.

Some states—California, Indiana, Illinois, Missouri, New York, and Texas, for example—have enlarged the appellate court system beyond the single Supreme Court by adding what are termed appellate courts. This has been done to relieve the one Supreme Court of the state of the growing burden of hearing all cases that are appealed. In some states, probably most, provision is made for the organization of probate courts, while in others the probate business is handled by the county court.⁶ Courts of probate jurisdiction are sometimes known as the surrogate's court, and the orphans' court.⁷

vent other creditors from seizing all the assets thus leaving the petitioning creditor to hold the sack.

⁵ Prosecutions brought for violations of the Sherman Anti-Trust Act are typical of the prosecutions brought in the United States District Court for violations of federal laws.

⁶ In Illinois, for example, in counties of over 70,000 population, there are probate courts, separate from and in addition to the county courts.

⁷ The city of Chicago has a unique judicial organization, known as the Municipal Court. There are 28 judges in the court, one called the Chief Justice. The court operates under a special form of procedure, from which many of the archaic technicalities of the com-

Supreme and Appellate Courts.—The Supreme Court of the state is the court of final jurisdiction in all cases arising in the state courts,⁸ except as previously indicated, where a federal question is involved in such a way as to open a further resort to the Supreme Court of the United States, and except where there is an appellate court to interrupt a portion of the appealed cases. In states where there are intermediate appellate courts, certain cases must in the first instance be carried there from the trial court, and can then be carried no higher, except in special instances.

Both the Supreme and appellate courts are with a few exceptions courts, not of original, but of appellate, jurisdiction. Their appellate function is simply to review records of trials which have been held in the lower or trial courts, for the purpose of determining whether the trials have been properly conducted. If no error has been committed by the trial court, the decision is affirmed, and the case is ended. If the trial court was in material error, the decision is reversed, and is either sent back to be retried in the court from whence it came, or is reversed and disposed of then and there, without being remanded to the lower court.

Circuit, District, or Superior Courts.—The circuit, district, or superior court (in New York it is called the Supreme Court) stands at the top of the list of trial courts, or courts of original jurisdiction. In it litigation of any kind, unless too petty, may be initiated and even the smaller cases be retried on appeal from a county or justice of the peace court.

mon-law procedure, which prevail in other courts of the state, have been eliminated. The court is subdivided into various specialized departments, known as the Morals Court (in which cases of public immorality are heard), the Domestic Relations Court (which determines wrongs against women and children, including abandonment and nonsupport cases), the Boys' Court (in which infractions of the law by boys between the ages of 16 and 21 years are dealt with), the Motor Vehicles Court, otherwise known as the Speeders' Court, and the police branches at the various police stations. The court also has law branches, which take concurrent jurisdiction with the circuit and superior courts of Cook county of all cases of tort and contract, and criminal branches, which have jurisdiction of misdemeanors, but not of felonies.

⁸ In New York the final court of appeal is called the Court of Appeals, while the Supreme Court, so called, is a trial court of general jurisdiction, corresponding to the circuit or superior court in other states.

In counties having a large population there are several circuit, district, or superior court judges, and the court is divided into a corresponding number of departments; the cases being assigned for trial by the presiding judge. In the circuit, district, or superior courts one will find, in the trial or preliminary stages: (1) Various proceedings in equity, including suits for divorce,⁹ bills to foreclose mortgages, bills for injunctions, i. e., requests that the court order certain persons not to do certain acts; (2) actions at law, such as personal injury cases against street railways and actions for breaches of contract; and (3) criminal cases, involving felonies, such as murder, robbery, and other serious crimes.

County and Probate Courts.—Ordinarily there is both a county court and a probate court in each county. Where there is no separate probate court, the county court, or a department of the circuit, district, or superior court, is given jurisdiction of all probate matters, by which we mean the settlement of estates of deceased and incompetent persons, and also of matters relating to guardian and ward and the adoption of infants. The settlement of estates involves proof of wills, issuance of letters testamentary, where there is a will, and of letters of administration, where there is no will, proof and payment of debts and legacies, assignment of dower and homestead, approval of executors' and administrators' accounts, ordering the sale of land to pay debts and to support infants and lunatics, allowance to families, and the distribution of estates. Where there is a separate probate court, it handles all the matters here enumerated. In counties where there is no special juvenile court judge, the mothers' pension and juvenile delinquency laws are administered by the judge of the county court.

The county court, also, has a limited common-law and

⁹ It should be here stated that divorce is of statutory and not common-law origin. In England, originally, all matters pertaining to divorce were disposed of in the Ecclesiastical courts. To-day, in England, they have been transferred, not to the courts of equity, but to the probate courts. In the United States the divorce problem is regulated by state statutes. Such statutes, in establishing the right to a divorce, prescribe specifically the grounds upon which it shall be granted. The grounds prescribed vary somewhat in the different states. The divorce laws are administered in our courts of equity.

criminal jurisdiction, limited in tort and contract actions by the amount involved (in Illinois, for example, the amount must not exceed \$1,000, and in Oregon, \$500), and in criminal cases by the seriousness of the crime. The county judge has no jurisdiction, except in a preliminary way, of crimes which call for higher punishment than fine or confinement in the county jail. In other words, the criminal trial jurisdiction of the county court is limited to misdemeanors. Penitentiary offenses (felonies) can only be tried in the circuit court.

Justice of the Peace and Police Magistrate Courts.—The justice of the peace court has jurisdiction of petty actions on contracts, actions for damages to real or personal property, of replevin suits for the recovery of the possession of personal property, and of forcible entry and detainer suits for the recovery of the possession of land—for example, by a landlord for the recovery of premises improperly withheld by a tenant. The justice of the peace court is the common recourse of the creditor for the collection of small debts. Justices of the peace may also try petty criminal cases, usually where the punishment involves only a small fine, and may serve as committing magistrates in the more serious crimes.

The police magistrate is primarily a city official, but is also *ex officio* a justice of the peace. He hears, however, only criminal causes. His time is chiefly occupied in hearing cases for violation of city ordinances and in acting as a committing magistrate in state offenses; i. e., in determining whether, in more serious state offenses, the accused shall be bound over to await the action of the grand jury.

SECTION 3.—PROCEDURE.

In General.—It is the purpose now to give a short sketch of the procedural steps through which a case may be carried from its inception to its termination. This will assist the news gatherer to follow in an intelligent manner the course

of a trial and give him a more exact understanding of many of the common legal terms that he will encounter in reporting court news. It is thought the object can best be attained by following through a series of typical cases, criminal, common-law, equitable, and probate. This will give the reader a picture of the procedure in the various branches of the law.

A Criminal Case—Arrest.—Putting into practice the maxim that one cannot have rabbit stew without the rabbit, the first step ordinarily in a criminal proceeding is the apprehension of the alleged offender. The arrest is preceded normally by the issuance of a warrant. This is a written order, signed by a magistrate, directing an officer of the law to seize the body of the accused and to bring him forthwith into court, to be dealt with according to law.¹⁰ The warrant, in turn, is preceded by the filing of a sworn complaint, stating that a crime has been committed and that there is cause to suspect the accused of having committed it. The complaint may be sworn to by any one who is cognizant of the facts, whether an officer of the law or not.

Arrest Without a Warrant.—Under special circumstances an arrest may be made without a warrant. A person caught in the act of committing a crime, whether the crime be a felony or a mere misdemeanor, may be arrested on the spot. Such arrest may be made by any one, whether an officer or a mere private citizen. If a felony has been committed, and there is reasonable cause to suspect a certain person, he may be placed under arrest by an officer or private citizen, without a warrant, even though the act is entirely past. But it

¹⁰ Form of warrant:

State of Illinois, County of Champaign—to wit:
To the Sheriff or Any Constable of Said County:

Whereas, A. B. has this day made complaint and information on oath before me, C. D., a justice of the peace of the county aforesaid, that X. Y., on the —— day of ——, A. D. ——, in said county, did feloniously steal, take, and carry away one overcoat, of the value of twenty-five dollars, of the goods and chattels of the said A. B.

These are therefore to command you forthwith to apprehend and bring before me, or some other justice of said county, the body of the said X. Y., to answer said complaint, and to be further dealt with according to law.

Given under my hand and seal, this —— day of ——, A. D. ——.
C. D., J. P. [Seal.]

must be noted especially that this applies only to the more serious offenses, called felonies, not to the lesser ones, called misdemeanors. In the case of misdemeanors, the offender must be taken in the act, if the arrest is without a warrant, even though the arrest be by an officer. Where the arrest is made by a private citizen, the accused must be turned over, as soon as possible, to an officer of the law.

Bench Warrant.—In contrast with the foregoing methods, the first step may consist of the returning of an indictment by a grand jury, or the filing of an information by the state's attorney, in which case the warrant issued is based thereon. This is called a bench warrant. In other respects it does not differ from the warrant above referred to.

Preliminary Examination.—It often happens that the magistrate who issues the warrant for an offender's arrest, or before whom he is taken after being arrested without a warrant, has no jurisdiction to try the charge which is laid against the accused. Let us suppose, for example, that one has been arrested for murder on a warrant issued by a justice of the peace or a police magistrate on the sworn complaint of a private citizen. When the accused is brought in, this magistrate has no jurisdiction to place the accused on trial on such a serious charge; but he does have the right, and indeed it is his duty, to conduct a preliminary examination to determine whether his further detention is justified. Witnesses may be offered for and against the accused, including, if he wishes to make it, a statement on his own behalf. Acting upon this evidence, the magistrate may decide that the case against the accused is so weak that no conviction could be reasonably hoped for and thereupon discharge him. But, if the evidence is sufficient to make out a reasonable presumption of guilt, he will be held for further action. Except in states where the grand jury has been abolished, it would mean admitting him to bail, if the offense be a bailable one, or in case of his failure to furnish bail, committing him to jail to await the action of the grand jury. In such cases it is usually said that he is bound over or held to await the action of the grand jury.

If the arrest was preceded by, and hence based upon, an

indictment by the grand jury, or, as the case may be, upon an information by the state's attorney, the only purpose of taking the accused before a magistrate is to have the amount of the bail determined.

Bail.—Pending further proceedings, of any nature, the accused may be admitted to bail. Bail is defined as "security given by a person charged with a crime for his appearance for further examination, or for trial, whereupon he is permitted to go at large." A good many states have constitutional provisions to the effect that "all prisoners shall, before conviction, be bailable by sufficient sureties except for capital offenses where the proof is evident or the presumption great."

The security may consist of a bond, signed by the accused alone, or by him and his sureties, or of the deposit of cash. A bond is a promise to pay a certain sum of money to the state in case the accused fails to appear at the time and place indicated by the court. If the court is willing to accept a bond signed by the accused alone, without sureties, it is said that he is allowed to go on his own recognizance. This is rarely done.

Complaint, Information, Indictment.—A formal written charge of crime, setting forth with reasonable particularity the nature of the offense which the state seeks to fasten upon the accused is a prerequisite to placing him on trial. Depending upon the character of the offense, this formal charge will consist of either a complaint, an information, or an indictment.

The complaint may be sworn to by a private citizen and is used only in the lesser offenses, viz. in those prosecuted in the justice of the peace and police magistrate courts.

An information is sworn to by the state's attorney. It is used in ordinary misdemeanors, and, in states where the grand jury system has been abolished, in felonies, as well.

The indictment is a formal charge of crime by the grand jury. Except in states where the grand jury system has been abolished, no lesser formality than an indictment will suffice to bring the accused to trial in the case of felonies;

he may be arrested on a complaint or information, but not tried. The indictment may be used in lesser cases.

Grand Jury.—The function of the grand jury is to determine whether a charge of crime in the form of an indictment shall be laid against individuals who have previously been held by a committing magistrate to await its action, or against any individual whose case is in any manner brought to their attention, even though he be not yet under arrest. Very generally the cases are brought to the notice of the grand jury through the office of the state's attorney, but not necessarily so. The offenses may be ferreted out by the jury's own independent activity.

If the jury decides to indict the accused, the foreman of the jury indorses upon the indictment, "A true bill," and signs his name thereunder. If the jury decides not to indict, the indorsement by the foreman reads, "Not a true bill." If a true bill is found, or, where the accused has had a preliminary examination and has been held by a magistrate to the grand jury, even if the finding is not a true bill, the indictment or bill of indictment is returned into court and placed on file with the clerk. In cases where the accused has not been apprehended, the file is kept secret until he is securely in the custody of the law. The finding of a true bill does not mean that the accused is in fact guilty, but merely that there is sufficient evidence to justify placing him on trial. At a later time, when the accused is placed on trial in open court, the state still has the full burden of proving him guilty beyond a reasonable doubt.

In contrast with the proceedings before the petit jury at the trial stage of the case, the hearings before the grand jury are secret. No one, other than the state's attorney or his deputy and a single witness at a time, is allowed in the room with the jury.

The grand jury varies in size in different states, ranging from twenty-three to seven; the larger number being the more common. The jurors are selected by specified statutory process from the residents of the county in which they serve, a new group being drawn for each new term of court. A foreman is appointed by the court, whose duty it is to pre-

side over the deliberations of the jury, administer oaths to the witnesses, and record the findings of the jury.

The Indictment.—A typical form of indictment is as follows:

State of Illinois, Champaign County.—ss.

April Term of the Circuit Court, in the Year of our
Lord, 1922.

The grand jurors, chosen, selected, and sworn in and for the county of Champaign, in the name and by the authority of the people of the state of Illinois, upon their oaths, present [here insert (1) a description of the offense, e. g., that the defendant, John Smith, did feloniously take, steal, and carry away one overcoat, of the goods and chattels of one Henry Jones, of the value of twenty dollars; and (2) the time; and (3) the place of committing the offense, and concluding] against the peace and dignity of the people of the said state of Illinois.

Stripped of peculiar expression and a mass of verbiage, the purpose of the indictment is the quite simple one of advising the accused of the nature of the accusation against him, so that he may prepare his defense, and of protecting him from the hardship of being prosecuted until there has been an express, sworn, recorded finding of probable guilt.

The complaint and the information have a similar purpose. They are documents which must be drawn with great skill and care, for slips result in delay, expense, and often miscarriages of justice.

An indictment is frequently subdivided into two or more counts. For example, in the first count the defendant may be charged with larceny and in the second count with burglary, or in the first count with murder by use of an axe and in the second count with murder by use of a knife. This does not mean that the state is seeking to fasten two separate and distinct crimes upon the accused, but rather that there is some doubt as to what interpretation the law may place upon certain facts, or as to what the facts will finally prove to be in some matters of detail, and hence, to avoid a fatal variance between the allegations and the proof, the

precaution is taken of alleging the same crime in two different ways. It is, indeed, not permissible to charge two separate crimes in the same indictment.

Arraignment, Pleas, Motions, Demurrers.—The first step following the return of an indictment, or the filing of an information or of a complaint, other than the apprehension of the accused, is his arraignment. By this is meant that he is brought into court, the charge is read to him, and he is asked to make his plea. If he pleads guilty, the court will then, or at a later appointed time, proceed to pass sentence. If he stands mute, a plea of not guilty is entered. If he pleads not guilty, or if the plea of not guilty has been entered because of his refusal to plead, the case is docketed for trial at a future convenient time. In the interim he may be confined in prison or released on bail, as the case may be.

However, instead of entering a plea of guilty or not guilty, the accused may prefer to raise some preliminary question of law. This may be accomplished by a motion or a demurrer. Defendant's counsel may, for example, move to quash the indictment, information, or complaint, on the ground that the facts alleged do not constitute a crime, or for other defects appearing, as he believes, on the face of such charging document. A similar purpose may be accomplished by demurrer. Unless the contention cuts under the whole prosecution, the chief immediate effect of a ruling by the court in favor of the motion or demurrer is the gaining of time, for a new indictment may be secured, or a new information or complaint be filed, which will obviate the difficulties presented.

A Criminal Trial.—The trial of one accused of crime is typical of all jury trials. First in order, when the court is convened for the trial of the cause, is the selection or impaneling of the jury.

But prior to this it has been necessary to take certain steps to produce in court a group of persons from whom the twelve necessary to try the case may be chosen. Statutory regulations in the various states govern the manner of selecting from the citizenry at large the panel of jurors to be on hand for a given term of court. If the regular panel is

exhausted before the jury is selected, additional jurors are obtained by ordering a special venire; i. e., an order to the clerk to call for an additional number of persons who are qualified for jury service.

In making a selection of the twelve who will constitute the jury in the particular case, the state's attorney and the attorney for the defendant examine the jurors touching their qualifications to serve. The rules as to qualification are designed to produce a jury physically able to stand the ordeal of the trial, mentally fit to grasp the matters in issue, and with minds untrammelled by prejudice. Failure to measure up to these standards constitutes a basis of challenge for cause, and, if taken advantage of by either side, will result in the prospective juror being excused. As a practical matter, if an attorney for purely personal reasons, sometimes intuitive, is satisfied that he does not wish the juror, he will make every effort to bring out facts which will sustain a challenge for cause. Failing in this, he may fall back upon what are called his peremptory challenges; that is, in every case, each side is allowed to reject a limited number of jurors without assigning any cause. The number of such challenges depends upon the seriousness of the offense. In Illinois, for example, six peremptory challenges are allowed in case of misdemeanor, ten in case of the ordinary felony, and twenty where the penalty is life imprisonment or death. The number of such challenges allowed varies in the different states.

When twelve jurors are finally agreed upon, they are placed under oath to try the case according to the law and the evidence, and the trial proceeds.

The attorney for the state in an opening statement outlines to the jury briefly the main facts that he will seek to establish by witnesses, and counsel for the defendant makes a similar statement on behalf of the accused. Witnesses are then called to testify to facts calculated to show the defendant's guilt. The examination by the attorney who calls the witness is called the direct examination. When that is completed, counsel for the other side is allowed to examine the same witness. This is called cross-examination. Cross-

examination may be followed by redirect examination by the first attorney, and that in turn by a recross-examination by the second attorney. What a witness will be permitted to testify to and the manner of giving his testimony are determined by numerous and well-defined rules of evidence. A violation of these rules constitutes the basis of objections to testimony made by the attorneys and an erroneous ruling on the objections may lead to a reversal of the case by a higher court. After the state has called all of its available witnesses, the defendant's witnesses are heard. When all the testimony is in, it is summed up and reviewed in the addresses of counsel to the jury. The opening and closing speeches are made by the attorney for the state, and the intermediate argument by counsel for the defendant. Arguments by counsel are followed by instructions by the court, in which the rules of law pertaining to the case are laid before the jury. The jury is then placed in charge of the bailiff, and is taken by him to the jury room to deliberate in secret. The jury elects one of its number foreman, who signs the verdict when it is agreed upon by the twelve. If the twelve cannot agree, after a reasonable length of time, they may be discharged, and a new trial ordered. If the verdict returned is "not guilty," the accused is forthwith discharged, and cannot, by constitutional provisions, be tried again for the same offense. If the verdict is "guilty," the accused may file in the same court a motion to have the verdict set aside and a new trial granted, or he may make a motion in arrest of judgment. Having failed in these, he may take the case to a higher court. If, on appeal, the trial court is sustained, the execution of the sentence begins at once. If, for some error, the case is reversed, it is sent back to the court from which it came for a new trial, or is reversed without being remanded. In the latter event the defendant is ordered released. It should be observed, however, that the case is not retried in the Supreme Court. The proceedings of the trial court are there merely reviewed.

Coroner's Inquest.—When the coroner knows or is informed that there has been found within the county the body of any person *supposed to have come to his or her*

death by violence, casualty, or undue means, he is required to take charge of it and to summon a jury of the vicinity to inquire into the cause and manner of the death. The coroner has power to summon witnesses. On the basis of the findings of the coroner's jury, the person or persons believed by the jury to be responsible criminally for the death may be placed under arrest. In some states the inquest may take the place of a preliminary examination before a magistrate, and in itself justify binding the party over to the grand jury. In other states it only justifies the arrest, and the preliminary examination must follow.

Nolle Prosequi.—This is a formal entry upon the record by the prosecuting officer, by which he declares that he will not prosecute the case any further. This refusal may be limited to certain counts only of the indictment, or it may extend to the entire case. The case is then in whole or in part dismissed. The common form of expression is that the case was “*nolle prossed*,” or simply “*nolled*.”

This procedure is resorted to where, subsequent to the filing of the information or indictment, the discovery of new facts convinces the state's attorney that the accused is not guilty, or, for other reasons, it is deemed undesirable to continue with the prosecution. Formerly the district attorney had complete authority in this proceeding. To-day the dismissal requires the approval of the court.

Change of Venue.—Under certain circumstances a person charged with crime may have the trial of the case transferred from the court in which it would in ordinary course be tried to another court. This is called a change of venue. The purpose is usually either to have the case come before a different judge because of probable prejudices on the part of the first judge calculated to prevent a fair trial, or to escape the public prejudices which sometimes spring up from the commission of a particularly heinous crime, and which would make it difficult, if not impossible, to secure unbiased jurors or keep them immune from sinister outside influence after being selected. The latter conditions justify the removal of the case to a different county.

Fugitives from Justice—Extradition.—A person who commits a crime in one jurisdiction and flees into another, whether it be from one country to another or from one state to another, cannot lawfully be pursued and arrested in the latter without its consent, even though the officer be armed with a warrant. The proper procedure is to have the offender extradited.

The rules governing extradition are fixed by treaty as between nations and by the Constitution of the United States, supplemented by acts of Congress and state statutes, as between states. When a crime has been committed in state A, and the perpetrator has fled into or was already in state B, the law requires that a charge first be laid against him in state A. The Governor of state A will then, upon request, make a demand upon the Governor of state B to have the accused arrested and delivered over to the agent of state A appointed to receive the prisoner.

Habeas Corpus.—The writ of habeas corpus is a process by which one illegally deprived of his liberty may secure his release without awaiting the formalities of trial. Without some such process, one might be seized and held in prison indefinitely without trial, or, while awaiting trial, be denied his right to be released on bail. In these and other cases the one confined may appeal to the court for an order requiring the person who has the petitioner in confinement to bring him before the court and show the reason and authority for the confinement. After a long struggle between the crown and the people of England, this bulwark of human liberty was finally perfected and secured by the great Habeas Corpus Act, known as 31 Car. II. In the United States the right to the writ is recognized by the federal and the state Constitutions.

Action at Law.—Typical actions at law, as distinguished from criminal actions and equitable actions, are actions brought to recover compensation for damage done to one's person, one's property, or one's reputation, called tort actions, or for damages arising out of a breach of contract. In most states the action is initiated by the filing of a complaint or declaration which sets forth the plaintiff's cause of

action. In states where common-law procedure prevails, the suit is instituted by the filing of a *præcipe*. This is a written request to the clerk of the court to issue a summons to the defendant to appear and answer the plaintiff's claim, the amount of which is stated in the *præcipe*, at a certain term of court. The *præcipe* is signed by the plaintiff's attorney. Upon the filing of the *præcipe*, the clerk issues a summons, directed to the sheriff, and commanding him to summon the defendant to appear on the first day of the term of court indicated in the *præcipe*, and answer the plaintiff's claim for damages in a certain amount. The sheriff serves a copy of this on the defendant, makes a memorandum of the service on the original, and returns it to the clerk who issued it for filing. This service of summons is then followed by the filing of the declaration or complaint.

Complaint or Declaration, Pleadings by the Defendant, and Trial.—The complaint or declaration is a formal statement of the plaintiff's claim against the defendant. As stated above, this pleading is in some states filed first; in others, it comes later. When it is the first paper filed, it is served upon the defendant along with the summons.¹¹ The next

¹¹ Sample common-law declarations:

(1) Declaration in a contract action:

State of Illinois, County of Champaign—ss.:

In the Circuit Court of Champaign County.

A. B. vs. C. D.

General Number ———.

Term Number ———.

A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea of trespass on the case:

For that the defendant, on the 18th day of July, 1919, in the county aforesaid, was indebted to the plaintiff in the sum of \$1,000 for goods, chattels, and effects before that time sold and delivered by the plaintiff to the defendant at his request.

Yet the defendant, though requested, has not paid the same, or any part thereof, to the plaintiff, but refuses so to do, to the damage of the plaintiff in the sum of \$1,000, and therefore he brings this suit.

(2) Declaration in a tort action:

State of Illinois, County of Champaign—ss.:

In the Circuit Court of Champaign County.

A. B. vs. C. D.

General Number ———.

Term Number ———.

A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea of trespass on the case:

For that, heretofore, to wit, June 8, 1919, the defendant owned, operated, and controlled a certain street car, known as an Ashland

move is by the defendant, and may consist of filing either a demurrer or a motion, with a view to raising some preliminary question of law, or a plea. The plea may be either a general denial or a plea in confession and avoidance. A general denial disputes the plaintiff's claim in its entirety. A plea in confession and avoidance consists of the presentation of certain facts calculated to excuse or justify the matters charged against the defendant. The final purpose and result of these various pleadings is to bring the parties to some definite issue; i. e., a point of law or fact, affirmed by one side and denied by the other. They are necessary preliminaries of the trial. The trial itself, which may be with a jury, or before the court without a jury, follows the general order already outlined in the criminal case. The action at law terminates in a judgment either for the defendant or for the plaintiff. If the verdict of the jury or decision of the court, as the case may be, is for the defendant, he is awarded a judgment for a sum of money sufficient to cover certain of the costs of the case. On the other hand, if the verdict is for the plaintiff, he is awarded a judgment for the amount found to be due to him by the verdict, plus the costs. If this amount is not voluntarily paid by the defendant, the plaintiff may have a writ of execution issued, which is an order to the sheriff or constable to seize property of the defendant, and sell it at public auction, and apply the proceeds towards paying the judgment. And the same course is open to the defendant to satisfy his judgment for costs, if the plaintiff fails to pay them voluntarily.

avenue car, on, to wit, Ashland avenue, a public street in the city of Chicago, county and state aforesaid, and at or near and across a certain other public street in said city, county and state, to wit, Madison street, and plaintiff, being in the exercise of reasonable care, the defendant then and there so negligently, carelessly, wrongfully, and improperly ran, managed, and operated its certain north-bound Ashland avenue car, and then and there ran the same into, upon, against, and over the plaintiff, who was thereby then and there thrown down to, upon, and against the street and pavement there, and was thereby greatly hurt, bruised, contused, wounded, and injured, and divers of the bones of the plaintiff's body were broken, and he became sick, sore, lame, and disordered, and has so remained for a long space of time, to wit, from then hitherto, and is permanently injured, and has suffered greatly in mind and body, to the damage of the plaintiff in the sum of five thousand dollars.

A Suit in Equity.—A court of equity, in contrast with a court of law, acts upon or through individuals to accomplish certain ends. It does this by issuing commands to them to do or not to do certain acts; i. e., by decree or injunction. To illustrate: A court of law renders a money judgment at the termination of the trial; i. e., finds that the defendant is indebted to the plaintiff in a certain sum of money for goods purchased or labor performed, or as damages for his failure to perform a certain contract, or for harm done to the plaintiff or his property in some tort action. If the defendant fails to pay over the sum of money to the plaintiff, the plaintiff's only recourse is to secure a seizure under a writ of execution of some of the defendant's property, provided he has any. Whereas, a court of equity, having found, let us say, that the defendant has agreed to sell a piece of land to the plaintiff, may order the defendant to execute and deliver a deed of the land to the plaintiff in actual fulfillment of his contract. This order is called a decree for the specific performance of the contract. "Decree," then, is a term used in equity, in contrast with the term "judgment," as a law term. Or in another type of equity suit the object of the plaintiff may be to secure an injunction against the defendant, an order that he shall not do certain acts. A proceeding by an employer to have his striking employees restrained from interfering with his place of business is a typical suit for an injunction. If the court's decree or injunction is not obeyed, the defendant is said to be in contempt of court and may be punished by fine or imprisonment. Such weapons are used to enforce obedience to the orders of a court of equity.

Injunctions are of two kinds, temporary and permanent. A temporary injunction is issued before trial, with a view to preserving the existing order of things, until there can be a full investigation of the controversy. It is not a final determination of the case. The trial will later result in dissolving this temporary injunction, or in making it permanent in its original or in a modified form. Prior to the temporary injunction the court may issue a form of injunction called a preliminary injunction or restraining order. This may be issued by the judge in his private office (the techni-

cal expression is "by the judge in chambers"), not in open court, without giving the defendant a chance to be heard, and is for the purpose of preventing irreparable loss pending the application for a temporary injunction and the hearing thereon. This issuance of a preliminary injunction or restraining order by a judge in chambers is called an *ex parte* proceeding.

In the United States a suit for divorce is also a common type of equity case. The first paper filed is called a bill in equity for divorce. The bill occupies the same place in equity procedure that a declaration does in common-law procedure, viz. contains a statement of the facts on which the plaintiff bases his or her claim for relief. If the plaintiff's contentions are sustained, a decree of divorce is granted. A decree of absolute divorce severs the bonds of matrimony, and according to the usual practice may in a proper case further provide which of the parents shall have the children, if any. The decree may also provide for a division of property, or for the payment of a sum of money monthly for the support of the plaintiff and the children. This latter part of the decree is called a decree for alimony.

Probate Proceeding.—As previously indicated, the probate court, or the county court, when exercising probate jurisdiction, is chiefly occupied with the settlement of the estates of deceased persons. In order to point out the meaning of certain terms, it is necessary to assume two cases—one where the deceased has left a will, indicating how the property shall be disposed of, and the other where there is no will. In the former case the deceased is said to have died testate, and in the latter case intestate. Where a will is left, the person who is appointed to settle the estate is called the executor, if a man, and the executrix, if a woman, provided he or she be named as such in the will. But, if the person appointed is not named in the will, he or she is called administrator, or administratrix, with the will annexed. If no will is left, the appointee is called the administrator, if a man, and the administratrix, if a woman.

The appointment of the person to administer the estate is followed by the issuance of letters testamentary to an

executor or executrix, and, of letters of administration to an administrator or administratrix. These letters are the official certificate of the court declaring that the person therein named has been appointed to settle the estate. This certificate is a badge of authority. By way of illustration, it would be exhibited at the bank, where deceased had his money or safe deposit box, in order to gain possession thereof.

The first paper filed in a proceeding for the settlement of an estate is a petition for the appointment of such executor, executrix, administrator, or administratrix. The petition sets out the fact of death, states whether a will has been left or not, and gives the approximate value of the estate. Where a will has been left, the petition asks that the will be admitted to probate. On a day appointed the petitioner appears, presents the will, and calls the subscribing witnesses to testify to the circumstances of its execution. In order to have the will admitted to probate, the witnesses' testimony must show that the testator, or testatrix, signed the will in their presence and declared it to be his or her last will, and that in their opinion the deceased was at the time of executing the will of sound mind; also that when they signed as subscribing witnesses they were in the presence of the testator, or testatrix, and of each other, and acted at the request of the deceased. Procedure differs somewhat in the several states as to whether at this time any of these matters can be contested by other witnesses. In some states it is permissible for one who wishes to break the will to present other persons then and there to testify, for example, that deceased was insane and thus to seek to have the will rejected as void. In other states, the proceeding in the probate court is purely formal, and cannot go beyond the taking of the testimony of the subscribing witnesses. If their testimony sustains the will, it is forthwith admitted to probate. If their testimony does not sustain it—for example, if one of them should declare that in his opinion the deceased was insane—the will is rejected. The losing party may then appeal the case to the circuit, district, or superior court, where the question will be fully

examined into, through any and all witnesses that either side may wish to call. If the will is finally declared void, the estate is administered, just as if there had been no will.

Following the admission of the will to probate, the appointment of the proper person to settle the estate and the issuance of the letters testamentary or of administration, the court appoints competent persons to appraise the estate. The appraisers proceed forthwith to prepare and file an inventory of the property owned by the deceased, accompanied by a statement of its value as agreed upon and sworn to by the appraisers. Also at an early stage in the proceedings a notice is printed in a local paper of general circulation, which calls attention to the death and to the appointment of the executor or administrator, and which notifies all creditors of the estate to file their claims against the estate on or before a certain date. After the date set for the filing of claims, the person administering the estate proceeds to pay them. The money to pay the debts is taken first out of cash on hand; second, out of funds realized from the sale of personal estate; and, finally, if the other sources of cash are not adequate, out of the sale of real estate. The property remaining, after the payment of all the claims filed by creditors, including the costs of administration and of the inheritance taxes, is divided in accordance with the provisions of the will, if there is one, or as provided by law, where no will is left. The last step is the filing of a final account, showing that the estate has been fully administered, and the discharge of the executor or administrator.

CHAPTER III

LIBEL

SECTION 1.—DEFINITION

1. **Introductory.**—The orderly working of the social machine is dependent upon the recognition of certain mutual rights and obligations as between man and man. It is the function of the law and machinery of justice to define and enforce the rights and duties that are deemed essential to the maintenance of the social structure. In the discharge of this function the law recognizes the right of the individual to security in his person, his property, his family relations and his reputation, and the correlative duties of others to respect these rights. The law of defamation, otherwise known as libel and slander, has to do with the right of reputation. The journalist is concerned chiefly with libel, of which a defamatory newspaper article is a typical example. With slander, which is confined to oral defamation, he, in a professional way, has no concern.

Whether in the concrete case, liability, either civil or criminal, can be imposed for a written statement by A about B, depends, first, upon whether the statement is defamatory in its character within the meaning of the law, second, upon whether it has been published, as the law defines the term, and third, the two previous questions having been determined against A, upon whether A has a legal excuse or justification which will relieve him of liability. For example the statement may have been true, or it may have been a privileged report, or fair comment and criticism. Within certain fairly well-defined limits these circumstances will legally exonerate A. Other circumstances which journalists very often rely upon for protection will be found to be of no or at most of only minor legal avail.

A word about the method of treatment may prove helpful.

The subject is developed in part by the use of cases, because rules stated and committed independently of their application to concrete situations are of little worth. The daily problem, which the journalist faces in the practice of his profession, is in the concrete, not in the abstract. The cases which have come up for decision from the actual grind of the press, it is believed, will make the study more interesting by their appeal to the imagination, make the rules intelligible, serve the memory, and stand as solemn warnings against the commission of the same or similar mistakes.

Having made a careful study of the rules and of the reasons for the rules and having noted the application of them to certain typical concrete states of facts, it is expected that the reader will be in a position to solve for himself most of the routine problems that come to him in the course of the day and withal bring added grace to an honored profession by an abstemious refusal to play fast and loose with the reputations of his fellowmen.

It is of course not expected that each reporter shall attempt to make an ultimate decision on every question of libel that may arise in his work; nor is it considered desirable that the managing editor even shall make decisions on more important items when it is possible for him to submit the question to his attorney. But it is believed that every reporter should be familiar with the general principles and the more common rules of the law of libel, be intelligently guided in the doing of his tasks, and be in a position to know what matters should be called particularly to the attention of the management of the paper, and that emergency decisions which are inevitable in the conduct of the newspaper business may rest on a sounder basis than at present.

2. Definition of Libel.—Civil libel is defamation which appeals to the eye. It consists of written or printed matter, of a picture or an effigy, which holds a person up to public hatred, contempt, or ridicule, or which imputes to one shortcomings in his trade, office, calling, or profession.

Whatever fits this definition, if it has been brought to

the notice of a third person—i. e., has been “published”—is said to be libelous per se. This means that some damage is conclusively presumed to have resulted, and that judgment for at least nominal damages must as a matter of law be given for the plaintiff, unless perchance the defendant establishes a legal justification. It will be observed that libel is not confined to the publication of matter that is scandalous in its character. Holding one up to public hatred or ridicule comes equally under the legal ban. Likewise, imputations which touch one in his trade or profession, though often not scandalous, are nevertheless libelous; for example, falsely charging that one who is in business has become bankrupt, or that a lawyer is a dunce, or that a bank cashier is insane.

The following epithets are typical of those that have been held to come within the general definition: “Itchy old toad;” “impostor;” “frozen snake;” “mere man of straw;” “the most artful scoundrel that ever existed;” “anarchist;” “hypocrite and user of the cloak of religion for unworthy purposes.”¹

¹ Odgers, *Libel and Slander* (5th Ed.) 18; *Cervený v. Chicago Daily News Co.*, 139 Ill. 345, 28 N. E. 692, 13 L. R. A. 864; *Thorley v. Lord Kerry*, 4 Taunt. 355. For further illustrations of printed imputations held to be libelous per se, see *McBride v. Ellis*, 9 Rich. (S. C.) 313, 67 Am. Dec. 553 (notice of death of living person); *Sherin v. Eastwood*, 27 S. D. 312, 131 N. W. 287, Ann. Cas. 1913D, 257, and note (charges that person had been publicly horsewhipped by a woman, as a result of his conduct toward her); *Orband v. Kalamazoo Tel. Co.*, 170 Mich. 387, 136 N. W. 380, Ann. Cas. 1914A, 1124, and note (statement that a woman of good reputation was engaged to a man who was notoriously uncleanly, dissipated, and no account); *O'Toole v. Post Printing & Publishing Co.*, 179 Pa. 271, 36 Atl. 288 (story of an elopement of a young woman with a chewing gum agent); *Stewart v. Swift Specific Co.*, 76 Ga. 280, 2 Am. St. Rep. 40 (publication of what purported to be a story voluntarily given by a young woman to the effect that her mother, as result of taking a certain patent medicine, had taken on the characteristics of a cat, such as mewing and springing on imaginary rats; it was held libelous as to the daughter as well as the mother); *McFadden v. Morning Journal Ass'n*, 28 App. Div. 508, 51 N. Y. Supp. 275 (charge of participating in athletic contest for affections of a young man); *State v. Sheridan*, 14 Idaho, 222, 93 Pac. 656, 15 L. R. A. (N. S.) 497 (“Gooding and graft have become synonymous terms”); *Edwards v. San Jose Printing & Pub. Soc.*, 99 Cal. 431, 34 Pac. 123, 37 Am. St. Rep. 70 (“it is reported that Edwards is to have charge of the sack”); *Wells v. Times Printing Co.*, 77 Wash. 171, 137 Pac. 457 (charging plaintiff with having denounced the flag as a dirty rag).

2a. **Criminal Libel.**—Libel is a criminal as well as a civil wrong. Apart from rules as to publication, criminal libel differs from civil libel in only one particular. Civil libel is confined to defamation of a living person, whereas criminal libel includes as well holding a deceased person up to public hatred, ridicule, or contempt. The reason for this distinction is that the objective in civil libel is the award of damages as compensation to the injured person, while the law of criminal libel is concerned with the preservation of the peace. Defamation of the dead, no less than of the living, endangers the peace, since it is likely to be resented by the relatives, friends, and admirers of the deceased. Thus within recent years it was held in the state of Washington that a scurrilous attack by a newspaper on the character of George Washington was a criminal libel.² Criminal libel is, therefore, in its definition, inclusive of civil libel, and has as an additional basis defamation of the dead.

3. **Meaning of "Public" in Public Hatred, Ridicule, or Contempt.**—The "public" reaction to the subject-matter of the statement or picture is made the test of its character. Does this mean that, in order to be libelous, it must be calculated to call forth hatred, contempt, or ridicule from the entire public, or only from a portion of it? This question seems seldom to have been before the courts for express answer. The Supreme Court of the United States, when definitely confronted with it, declared that the alleged defamation need not by universal consent be considered defamatory, but that it is libelous if it would hurt one's standing with a "considerable and respectable class in the community." Indefinite though it is, this is probably as satisfactory an answer as can be given.³

4. **Slander Distinguished from Libel.**—Slander is oral defamation. Moreover, to sustain an action for slander, it must appear that the words fall within one of the following classes, viz: (1) Words which falsely impute to one the

² State v. Haffer, 94 Wash. 136, 162 Pac. 45, L. R. A. 1917C, 610. Ann. Cas. 1917E, 229.

³ Peck v. Tribune Co., *infra*, p. 39.

commission of some criminal offense involving moral turpitude; (2) words which falsely impute that one is infected with some loathesome disease; (3) words which falsely impute to one unfitness to perform the duties of his office or employment of profit, or the want of integrity in the discharge of the duties of his office or employment, or which are calculated to prejudice him in his profession, trade, or calling; (4) defamatory words, which, though not falling within any of the three categories above, occasion the party special damage.⁴ It is obvious that any language which, if spoken, would support an action of slander, will constitute a libel, if written. Since the journalist is not immediately concerned with the law of slander, it will not be traced any further.

5. Designation of the Defamed Person—Libel of a Group.—A libel is not committed upon an individual, unless a sufficient clue to his identity is given. However, he need not be specifically named. The designation may be sufficient, whether it is by name, by occupation, or by blanket reference to a specified group, of which one is a member. However, since the object of civil libel is to compensate a particular individual for a loss sustained by him, a personal action for damages will fail, unless the plaintiff can show that he was so described as to be identified by the readers. Otherwise such loss does not ensue. A somewhat difficult problem may thus be presented, where the reference is to a class or group of persons, by some composite designation. Whether a particular individual in the group can make it appear that he, personally, has suffered damage, may well depend upon the size of the group, the popular knowledge of its personnel, and the apparent purpose of the defamatory statements. It is a question of fact and of degree. A general invective against those who administer the law would not support civil libel, but it would probably be otherwise, if charges of corruption were made against the members of the Supreme Court of a certain state. Likewise a distinction would probably be drawn be-

⁴ Pollard v. Lyon, 91 U. S. 225, 23 L. Ed. 308, 311.

tween a defamatory attack upon the Legislature as a body, and upon all the members of the finance committee of the Senate. In *Ryckman v. Delavan*⁵ the court states the test as follows: “* * * If the words may, by any reasonable application, import a charge against several individuals, under some general description or name, the plaintiff has a right to go on trial, and it is for the jury to decide whether the charge has a personal application to the plaintiff.” An earlier New York court phrases the test in the following words:⁶ “* * * Where the libel has no particular and personal application, and is so general that no individual damages can be presumed, and the class or individuals so numerous, to whom it would apply, that vexation and oppression might grow out of a multiplicity of suits, no private suit shall be sustained. * * *” The foregoing all applies and is limited to civil libel. Approached from the criminal law side, the test is slightly different. In order to sustain a criminal prosecution, it is only necessary to find that the utterance was reasonably calculated to cause a breach of the peace. It is then much easier to find a criminal than a civil libel, where the reference is to a group, since any one identified even with a large group might readily resent the imputations against the organization as such. Thus it has been held that charges of cowardice and improper conduct against the “Northern troops” during the Civil War constituted criminal libel, and in the cases quoted from above the courts readily conceded that charges against the larger groups might well support criminal libel.

STATUTE—ILLINOIS

Hurd's Rev. St. 1921, c. 38, § 177: “A libel is a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputa-

⁵ 25 Wend. (N. Y.) 186 (1840).

⁶ *Sumner v. Buel*, 12 Johns. (N. Y.) 475 (1815).

tion, or publish the natural defects of one who is alive, and thereby expose him to public hatred, contempt, ridicule, or financial injury.”⁷

A. IN GENERAL

VILLERS v. MONSLEY.

(Court of Common Pleas, 1769. 2 Wils. 403, 95 Eng. Reprint, 886.)

Action upon the case against the defendant for maliciously writing and publishing a libel upon the plaintiff in the words following, viz.:

“Old Villers, so strong of brimstone you smell,
As if not long since you had got out of hell;
But this damnable smell I no longer can bear,
Therefore I desire you would come no more here;
You old stinking, old nasty, old itchy old toad,
If you come any more, you shall pay for your board,
You'll therefore take this as a warning from me,
And never more enter the doors, while they belong to F. P.
“Wilncoat, December 4, 1767.”

The defendant pleaded not guilty; a verdict was found for the plaintiff and sixpence damages, at the last assizes for the county of Warwick. And now it was moved by Serjeant Burland, in arrest of judgment, that this was not such a libel for which an action would lie; that the itch is a distemper to which every family is liable; to have it is no crime, nor does it bring any disgrace upon a man, for it may be innocently caught or taken by infection.

GOULD, J.⁸ What my brother Bathurst has said is very material; there is a distinction between libels and words; a libel is punishable both criminally and by action, when speaking the words would not be punishable in either way; for speaking the words “rogue” and “rascal” of any one, an action will not lie; but if those words were written and published of any one, I doubt not an action would lie. If one man should say [or-

⁷ This is intended to be a definition of criminal libel only. However, by omitting the clause, “tending to blacken the memory of one who is dead,” it may be converted into an orthodox definition of civil libel. Defamation of the dead is a criminal but not a civil wrong. The reason is that it tends to stir up a breach of the peace, but no one is personally damaged. For further distinctions between criminal and civil libel, see the cases in section 2, *infra*.

There are similar statutes in other states.

⁸ The statement of facts is abridged, and the opinions of Wilmot, L. C. J., and Clive and Bathurst, JJ., are omitted.

ally] of another that he has the itch, without more, an action would not lie; but if he should write those words of another, and publish them *maliciously*, as in the present case, I have no doubt at all but the action well lies.

What is the reason why saying a man has the *leprosy* or *plague* is actionable? It is because the having of either cuts a man off from society; so the writing and publishing maliciously that a man has the itch, and stinks of brimstone, cuts him off from society. I think the publishing anything of a man that renders him ridiculous is a libel and actionable, and in the present case am of opinion for the plaintiff. Judgment for the plaintiff.

MOORE v. FRANCIS et al.

(Court of Appeals of New York, 1890. 121 N. Y. 199, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810.)

ANDREWS, J.⁹ The alleged libelous publication which is the subject of this action was contained in the Troy Times of September 15, 1882, in an article written on the occasion of rumors of trouble in the financial condition of the Manufacturers' National Bank of Troy, of which the plaintiff was at the time of the publication, and for 18 years prior thereto had been, teller. The rumors referred to had caused a "run" upon the bank; and it is claimed by the defendants, and it is the fair conclusion from the evidence, that the primary motive of the article was to allay public excitement on the subject. That part of the publication charged to be libelous is as follows: "Several weeks ago, it was rumored that Amasa Moore, the teller of the bank, had tendered his resignation. Rumors at once began to circulate. A reporter inquired of Cashier Wellington if it was true that the teller had resigned, and received in reply the answer that Mr. Moore was on his vacation. More than this the cashier would not say. A rumor was circulated that Mr. Moore was suffering from overwork, and that his mental condition was not entirely good. Next came reports that Cashier Wellington was financially involved, and that the bank was in trouble. A Times reporter at once sought an interview with President Weed of the bank, and found him and Directors Morrison, Cowee, Bradwell, and others in consultation. They said that the bank was entirely sound, with a clear surplus of \$100,000; that there had been a little trouble in its affairs, occasioned by the mental derangement of Teller Moore, and that the latter's statements, when he was probably not responsi-

⁹ Parts of the opinion are omitted.

ble for what he said, had caused some bad rumors." The complaint is in the usual form, and charges that the publication was false and malicious, made with intent to injure the plaintiff in his good name and credit in his occupation as bank teller, and to cause it to be believed that, by reason of mental derangement, he had become incompetent to discharge his duties, and had caused injury to the bank, etc. * * *

Defamatory words, in common parlance, are such as impute some moral delinquency or some disreputable conduct to the person of whom they are spoken. Actions of slander, for the most part, are founded upon such imputations. But the action lies in some cases where the words impute no criminal offense; where no attack is made upon the moral character, nor any charge of personal dishonor. The first and larger class of actions are those brought for the vindication of reputation, in its strict sense, against damaging and calumnious aspersions. The other class fall, for the most part at least, within the third specification in the opinion of Chief Justice De Grey, of words which tend to injure one in his trade or occupation. The case of words affecting the credit of a trader, such as imputing bankruptcy or insolvency, is an illustration. The action is maintainable in such a case, although no fraud or dishonesty is charged, and although the words were spoken without actual malice. The law allows this form of action not only to protect a man's character as such, but to protect him in his occupation, also, against injurious imputations. It recognizes the right of a man to live, and the necessity of labor, and will not permit one to assail by words the pecuniary credit of another, except at the peril, in case they are untrue, of answering in damages. The principle is clearly stated by Bayley, J., in *Whittaker v. Bradley*, 7 Dowl. & R. 649: "Whatever words have a tendency to hurt, or are calculated to prejudice, a man who seeks his livelihood by any trade or business are actionable." Where proved to have been spoken in relation thereto, the action is supported; and unless the defendant shows a lawful excuse the plaintiff is entitled to recover without allegation or proof of special damage, because both the falsity of the words and resulting damage are presumed. *Craft v. Boite*, 1 Saund. 243, note; *Steele v. Southwick*, 1 Amer. Lead. Cas. 135.

The authorities tend to support the proposition that spoken words imputing insanity are actionable per se¹⁰ when spoken of one in his trade or occupation, but not otherwise, without

¹⁰ By this is meant that the law conclusively presumes that the person has been damaged at least to a nominal extent. It may be that the jury will award only one cent damages, but that will serve to vindicate the plaintiff's reputation and throw the costs of the action on the defendant.

proof of special damage. *Morgan v. Lingen*, 8 Law T. (N. S.) 800; *Joannes v. Burt*, 6 Allen, 236. The imputation of insanity in a written or printed publication is a fortiori libelous where it would constitute slander if the words were spoken. Written words are libelous in all cases where, if spoken, they would be actionable; but they may be libelous where they would not support an action for oral slander. There are many definitions of "libel." The one by Hamilton in his argument in *People v. Croswell*, 3 Johns. Cas. 337, viz., "a censorious or ridiculing writing, picture, or sign, made with malicious intent towards government, magistrates, or individuals," has often been referred to with approval. But, unless the word "censorious" is given a much broader signification than strictly belongs to it, the definition would not seem to comprehend all cases of libelous words. The word "libel," as expounded in the cases, is not limited to written or printed words which defame a man, in the ordinary sense, or which impute blame or moral turpitude, or which criticise or censure him. In the case before referred to, words affecting a man injuriously in his trade or occupation may be libelous although they convey no imputation upon his character. Words, says Starkie, are libelous if they affect a person in his profession, trade, or business, "by imputing to him any kind of fraud, dishonesty, misconduct, incapacity, unfitness, or want of any necessary qualification in the exercise thereof." Starkie, *Sland.* § 188.

* * *

There can be no doubt that the imputation of insanity against a man employed in a position of trust and confidence, such as that of a bank teller, whether the insanity is temporary or not, although accompanied by the explanation that it was induced by overwork, is calculated to injure and prejudice him in that employment, and especially where the statement is added that, in consequence of his conduct in that condition, the bank had been involved in trouble. The directors of a bank would naturally hesitate to employ a person as teller whose mind had once given way under stress of similar duties, and run the risk of a recurrence of the malady. The publication was, we think, defamatory, in a legal sense, although it imputed no crime, and subjected the plaintiff to no disgrace, reproach, or obloquy, for the reason that its tendency was to subject the plaintiff to temporal loss, and deprive him of those advantages and opportunities as a member of the community which are open to those who have both a sound mind and a sound body. The trial judge, therefore, erred in not ruling the question of libel as one of law. The evidence renders it clear that no actual injury to the plaintiff was intended by the defendants; but it is not a legal excuse that defamatory matter was published ac-

cidentally or inadvertently, or with good motives, and in an honest belief in its truth.

The judgment [which was for the defendant in the trial court] should be reversed, and a new trial granted.

All concur.

Judgment reversed.¹¹

PECK v. TRIBUNE CO.

(Supreme Court of the United States, 1909. 214 U. S. 185, 29 Sup. Ct. 554, 53 L. Ed. 960, 16 Ann. Cas. 1075. Reversing the Circuit Court of Appeals, Seventh Circuit, 1907. 154 Fed. 330, 83 C. C. A. 202.)

This is an action on the case for libel. The defendant published the plaintiff's photograph over the name Mrs. A. Schuman, as part of a testimonial in praise of Duffy's Pure Malt Whisky. The advertisement stated that she was a nurse and constant user of the whisky.

The trial court directed a verdict for the defendant. This ruling was sustained by the Circuit Court of Appeals, but reversed by the Supreme Court of the United States.

Mr. Justice HOLMES delivered the opinion of the court.¹²

* * *

The question, then, is whether the publication was a libel. It was held by the Circuit Court of Appeals not to be, or, at most, to entitle the plaintiff only to nominal damages, no special damage being alleged. It was pointed out that there was no general consensus of opinion that to drink whisky is wrong, or that to be a nurse is discreditable. It might have been added that very possibly giving a certificate and the use of one's portrait in aid of an advertisement would be regarded with irony, or a stronger feeling, only by a few. But it appears to us that such inquiries are beside the point. It may be that the action for libel is of little use, but, while it is maintained, it should be governed by the general principles of tort. If the advertisement obviously would hurt the plain-

¹¹ This means that the published statement constituted a libel on the plaintiff, and that judgment of the trial court should have been in his favor. See, accord, *McClintock v. McClure*, 171 Ky. 714, 188 S. W. 867, Ann. Cas. 1918E, 96; *Perkins v. Mitchell*, 31 Barb. (N. Y.) 461; *Southwick v. Stevens*, 10 Johns. (N. Y.) 443 (editor charged rival, in spirit of ridicule, with being insane); *Hibdan v. Moyer* (Tex. Civ. App.) 197 S. W. 1117 (rival editor referred to as having "brainstorms"; the court said, "To accuse plaintiff of having 'brainstorms' is the publication of a natural defect and exposes him to ridicule"); *Totten v. Sun Printing & Publishing Ass'n* (C. C.) 109 Fed. 289 (plaintiff accused of having unsound mind and of having been discharged as professor in a scientific school in consequence).

¹² Part of the opinion is omitted.

tiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote.

We know of no decision in which this matter is discussed upon principle. But obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm. Thus, if a doctor were represented as advertising, the fact that it would affect his standing with others of his profession might make the representation actionable, although advertising is not reputed dishonest, and even seems to be regarded by many with pride. See *Martin v. The Picayune* (*Martin v. Nicholson Pub. Co.*) 115 La. 979, 4 L. R. A. (N. S.) 861, 40 So. 376. It seems to us impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in the community. Therefore it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all that it could ask if it had been permitted to persuade them, if it could, to take a contrary view. *Culmer v. Canby*, 41 C. C. A. 302, 101 Fed. 195, 197; *Twombly v. Monroe*, 136 Mass. 464, 469. See *Gates v. New York Recorder Co.*, 155 N. Y. 228, 49 N. E. 769.

It is unnecessary to consider the question whether the publication of the plaintiff's likeness was a tort per se. It is enough for the present case that the law should at least be prompt to recognize the injuries that may arise from an unauthorized use in connection with other facts, even if more subtilty is needed to state the wrong than is needed here. In this instance we feel no doubt.

Judgment reversed.¹³

B. IDENTIFICATION OF THE PERSON DEFAMED—PLAINTIFF ONE OF A CLASS

PALMER v. CITY OF CONCORD.

(Supreme Judicial Court of New Hampshire, 1868. 48 N. H. 211, 97 Am. Dec. 605.)

The plaintiff was the publisher and printer of a newspaper called the Democratic Standard, at Concord, where he commenced its publication in 1857. His printing materials were

¹³ The decision is that the jury should have been permitted to decide whether this publication was calculated to bring the plaintiff

destroyed between 3 and 4 o'clock, in the afternoon of August 8, 1861, by a mob consisting of privates of the First New Hampshire Regiment Volunteers, and other persons. He claimed to recover for those materials, and for the injury to, or destruction of, the good will of the Standard, and the interruption and destruction of his business.

One of the questions raised in the case was whether the destruction of the plaintiff's property was caused by his own illegal or improper conduct. The answer to the question depended upon whether the following articles published in the Standard should be considered libelous:

- (1) "The Late Battle—Impromptu.
 "It frightened the Federals to see them come,
 They wheeled about and away they run,
 They *Run* so fast to tell the news,
 They left their knapsacks, guns and shoes."
- (2) "Epigram.
 "To Manassas Junction
 The Yankees thought was fun,
 But greatly were mistaken,
 For they only took the *Run*."
- (3) "Changing Tune.
 "Forward to Richmond, let us fly!
 The Yankees shout, while blundering on;
 But Davis changed their battle cry
 To 'Backward, boys, to Washington.'"

(4) "Our Southern papers are filled with heart-sickening accounts of the murders and robberies which individuals in Old Abe's Mob are perpetrating on the Southern people. Innocent women and children are shot on their own door steps, for wearing what is called 'secession bonnets.' No wonder the Northern people run, when the honest men of the South march towards them."

(5) "The Black Republicans are making a great ado over the treatment of our dead and wounded soldiers by the Confederate troops, at the battle of Bull Run. But not one word have they to say about the conduct of *ours* upon men, women and children, in Hampton, Martinsburg, Fairfax, Germantown, and other places in Virginia and Missouri through which they have passed."

The court instructed the jury that, as matter of law, the articles above quoted were not libelous; that no action, civil

into public hatred, ridicule, or contempt, and that the "public" does not as a matter of law mean the entire public, but only "an important and respectable part" of it.

or criminal, could be maintained against the plaintiff for publishing those articles with any intent whatever; that plaintiff was guilty of no illegal conduct in writing or publishing any of those articles. To these instructions the defendant excepted. * * *

SMITH, J.¹⁴ I. A libel, as applicable to individuals, is a malicious publication, tending to injure the reputation of the person libeled, and expose him to public hatred, contempt, or ridicule. 2 Kent's Com. 16, 17; Bellows, J., in *Smart v. Blanchard*, 42 N. H. 137, 151. The first of these articles charges the United States forces in Virginia with cowardice, and holds them up as objects of ridicule therefor. The fourth article calls the army a "mob," and, although the charges of murder and robbery may perhaps be considered as limited in their application, the charge of cowardice against the whole army is repeated. The fifth article in effect charges those bodies of soldiers who passed through, or occupied, Hampton, Martinsburg, Fairfax, or Germantown, with improper treatment of persons of all ages and sexes in each of those places. If such charges had been made against a single soldier named in the articles, they would *prima facie* have constituted a libel. The tendency to expose him to contempt or ridicule could not be doubted; and the tendency to injure his professional reputation would be equally apparent. A soldier's character for courage or discipline is as essential to his good standing as a merchant's reputation for honesty, or a physician's reputation as to professional learning or skill, would be in their respective callings. And by military law, to which the soldier is amenable, we suppose cowardice would be regarded as a crime punishable by severe penalties.

As these charges were made against a body of men, without specifying individuals, it may be that no individual soldier could have maintained a private action therefor. But the question whether the publication might not afford ground for a public prosecution is entirely different. Civil suits for libel are maintainable only on the ground that the plaintiff has individually suffered damage. Indictments for libel are sustained principally because the publication of a libel tends to a breach of the peace, and thus to the disturbance of society at large. It is obvious that a libelous attack on a body of men, though no individuals be pointed out, may tend as much, or more, to create public disturbances as an attack on one individual; and a doubt has been suggested whether "the fact of numbers defamed does not add to the enormity of the

¹⁴ The statement of facts is rewritten, and part of the opinion is omitted.

act." See 2 Bishop on Criminal Law (3d Ed.) § 922; Holt on Libel, 246, 247; Russell on Crimes (1st Am. Ed.) 305, 332. In *Sumner v. Buel*, 12 Johns. 475, where a majority of the court held that a civil action could not be maintained by an officer of a regiment for a publication reflecting on the officers generally, unless there was an averment of special damage, Thompson, C. J., said (page 478): "The offender, in such case, does not go without punishment. The law has provided a fit and proper remedy, by indictment; and the generality and extent of such libels make them more peculiarly public offenses." In *Ryckman v. Delavan*, 25 Wend. (N. Y.) 186, Walworth, Chancellor, who held, in opposition to the majority of the Court of Errors, that the plaintiff could not maintain a civil suit because the publication reflected upon a class of individuals and not upon the plaintiff personally, said (pages 195, 196): "There are many cases in the books where the writers and publishers of defamatory charges, reflecting upon the conduct of particular classes, or bodies of individuals, have been proceeded against by *indictment* or *information*, although no particular one was named or designated therein, to whom the charge had a personal application. All those cases, however, whether the libel is upon an organized body of men, as a Legislature, a court of justice, a church, or a company of soldiers, or upon a particular class of individuals, proceed upon the ground that the charge is a misdemeanor, although it has no particular personal application to the individual of the body or class libeled, because it tends to excite the angry passions of the community, either in favor of or against the body or class in reference to the conduct of which the charge is made, or because it tends to impair the confidence of the people in their government or in the administration of its laws." In the course of his opinion the Chancellor mentions a Scotch case, (*Shearlock v. Beardsworth*, 1 Murray's Rep. of Jury Cases,) where a civil suit was maintained which was "brought by a lieutenant colonel in behalf of his whole regiment for defamation, in calling them a regiment of cowards and blackguards." In *Rex v. Hector Campbell*, King's Bench, Mil. Term, 1808, (cited in Holt on Libel, 249, 250,) an information was granted "for a libel on the college of physicians;" and the respondent was convicted and sentenced.

Cases may be supposed where publications, though of a defamatory nature, have such a wide and general application that in all probability a breach of the peace would not be caused thereby; but it does not seem to us that the present publication belongs to that class.

Our conclusion is that the jury should have been instructed that the first, fourth and fifth articles were *prima facie* li-

belous, and that the publication of those articles must be regarded as "illegal conduct, unless justified or excused by facts sufficient to constitute a defense to an indictment for libel." * * *

Case discharged.¹⁵

RYCKMAN v. DELAVAN.

(Court of Errors, New York, 1840. 25 Wend. 186.)

Senator VERPLANCK.¹⁶ In a publication charging a number of brewers and malsters in the City of Albany with certain unwholesome and filthy practices in the process of malting, it was said that "there are several malt-houses on the Hill (at Albany), all of which rely on water taken from such places [stagnant pools, gutters and ditches];" that "the facts stated are known to hundreds residing in the neighborhood of the malting establishments," together with other similar language relating to these malt-houses. The plaintiff is a partner in one of these malt-houses "on the Hill," of which there are six, owned by several different firms, each composed of two or more partners. This charge, if false and malicious, is admitted to be libelous if made against the plaintiff singly or by name; and as it is now presented on this demurrer, it must be presumed to be thus false and malicious, as we must here assume the material allegations and averments of the declaration to be true.

The question, therefore, is, whether the charge thus made amounts to a personal imputation against the plaintiff? It is very evident that the charge is general, and includes all those who own and carry on business in the several malt-houses described. Of these persons, the plaintiff is one. The accusation includes all of them: and this, therefore, does not resemble those ancient cases in libel or slander, where it was held with more strictness than courts now entertain, that when a charge is made upon some one person indefinitely out of many, without any indication of the individual meant, the action was not maintainable on account of the uncertainty of the charge. But the Supreme Court held that the alleged libel is not an imputation upon any individual, but is a general censure of a class of persons which happens to include the plaintiff; so that according to the decision in *Sumner v. Buel*, 12 Johns.

¹⁵ This means that the plaintiff's own illegal act in publishing a libel was the cause of the destruction of his property. The only point we are concerned about is the holding that the matters published constituted a criminal libel.

¹⁶ The statement of facts and part of the opinion of the chancellor are omitted.

475, it can have no such special personal application as to furnish ground for an action.

The distinction between a libel aimed at an individual, and the censure or satire of a whole class of the community to which that individual happens to belong, is unquestionable; being alike founded in the reason of the thing and supported by authority. No better definition of a libel can be given than that of Chief Justice Parsons: "A libel is a malicious publication expressed either in printing, or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt and ridicule." *Commonwealth v. Clap*, 4 Mass. 168, 3 Am. Dec. 212. To the same effect is the definition given by Hamilton, in the celebrated *Croswell Case*, and since repeatedly adopted in our own courts, as in *Steele v. Southwick*, 9 Johns. 215. In a private suit, it is the injury inflicted upon the individual for which pecuniary compensation is sought. It is the malicious intention of the libeler towards the injured individual that authorizes the latter to seek redress. The proof, or else the necessary presumption of individual malice, and the inflicting of individual injury, are the sole grounds of the civil action and of the remedy it affords. General censure or reproof, satire or invective, directed against large classes of society, whether on moral, theological or political grounds, cannot ordinarily be prompted by individual malice or intended to produce personal injury. The politician who assails the opposite party, the polemical divine who attacks the doctrine or the discipline of another church or sect, or the moral satirist who lashes the vices or the foibles of his age and nation, ought not to be held responsible in private suits for the bold avowal of opinions true or false. The principle upon which the civil remedy is allowed, does not apply here; and the great interests of society require that it should not be made to apply. It is far better for the public welfare that some occasional consequential injury to an individual, arising from general censure of his profession, his party, or his sect, should go without remedy, than that free discussion on the great questions of politics, or morals, or faith, should be checked by the dread of embittered and boundless litigation. When such publications so far transcend the limits of fair discussion or legitimate moral rebuke, as to threaten public injury, they are most effectually as well as most properly prevented or punished by public prosecution.

But both in civil and in criminal prosecutions, whether it be punishment that is sought, or compensation for an injury inflicted by libel upon an individual, the rule laid down long ago in *Rex v. Alme*, 3 Salk. 224, must apply: "Where a writing inveighs against mankind in general, or against a particular

class of men, as, for instance, men of the gown, this is no libel; but it must descend to particulars and individuals to make it a libel." Yet it does not thence follow, because a man is libeled—not by name or title or other specific description of himself, but under some such description of persons as includes certain other persons, and marks the individuality of each of them as much as if they were all severally named—that therefore, this is no libel, having a personal application upon which a civil suit can be maintained. The application of the injurious charge to a particular person must be made on the same principle that the meaning of the charge itself is explained. Both are to be taken according to the common understanding of men and the customary use of language. In construing the meaning of a libel, courts and juries are to take the words "as all men understand them; and judges cannot understand them differently in court from what they would do out of court." *Per Le Blanc, J., Woolnoth v. Meadows*, 5 East, 463. "Upon occasions of this sort," says Judge Buller, "I have never adopted any other rule than that frequently stated by Lord Mansfield to juries, desiring them to read the paper stated to be a libel, as men of common understanding, and say whether in their minds it conveys the sense imputed." 2 T. R. 206. So, too, as to the personal application of the libel; whether it be a general censure of a class of society, or is leveled at one or more individuals, must be a question for every day common sense to decide.

The Roman Catholic clergy, or the clergy of the Dutch Reformed Church, are orders or bodies of men. Theological warfare might lead some polemic to make weighty and unfounded charges against the character and morals of either class. However much we might regret the absence of Christian charity, or however individuals might accidentally suffer from such criminations, yet the law could not authorize civil remedies without injurious effect upon the right of free discussion, so essential to the establishment and the vindication of truth. But if, among general censures of the clergy, imputations seriously affecting private character were made against "all the Roman Catholic clergy of Albany," when it was well known that there were but two, and so averred; or against "all the clergy of the Collegiate Dutch Church of New York (of whom it might be averred and proved that there are but three)." can it be doubted that this charge was leveled at those two or those three individually? So a theoretical reformer of the law, of the school of Jeremy Bentham, may assail the judges of the land, and although he may villify an honorable and learned body of men, he intends no personal injury which should be compensated by the recovery of damages. But suppose, in the course of such general invective against those who adminis-

ter our laws, a charge of corrupt and partial decision in a particular case to have been made against "all the present judges of the Supreme Court." Is not this to the common understanding of men as clear as if Judges Nelson, Bronson and Cowen were distinctly named?

Again: Let us imagine some general satire or invective against the whole course of our state legislation, to appear in print. Much of this might have no application except to the Legislature as a body, and could only be rebuked legally by a criminal prosecution. But if, in giving examples of the widespread corruption charged, a more specific accusation of bribery in some given case were made against "all the members of the finance committee of the Senate," can it be doubted that each of the three Senators composing that committee is as much and as clearly charged with crime, and held up individually to public odium, as if they had been severally so charged by name? It is not easy to lay down a definite rule which would distinguish in the innumerable cases that may occur, when the libel is directed against the individuals of a class, and when it is merely censure of the class as such. But it is very safe to leave the question to be settled, whenever it arises, upon the same principle which courts uniformly apply to the interpretation of the words conveying the libelous charge itself. The reason of the thing is the same in both instances, and the authorities that govern one class of indirect and ambiguously expressed libels or slanders apply equally to the other. Thus in the case of *Goodrich v. Woolcott*, 3 Cow. 231, affirmed in our own court, *Woolcott v. Goodrich*, 5 Cow. 714: "The inquiry is not, said Judge Sutherland, whether the words could have been understood in any other way, but whether that is the construction which common people naturally put upon them." "If the words were of doubtful signification, it is the province of the jury to decide in what sense they are used." It is only when the words are such as cannot in any sense be slanderous, that the court can determine that they are not sufficient to form the legal basis of an action; but whenever words are capable of more than one construction, it is the province of the jury to determine in what sense they were meant. This is the rule in which, I believe, all the American cases of any authority concur with all the English decisions for the last hundred years, for several of the older ones were, as Lord Mansfield said, 2 Cowp. 672: "pregnant with the nimia subtilitas which Lord Coke so justly reprobates." Upon the same principle, if it appears clearly and undeniably on the plaintiff's own declaratory statement of his case, that the charge was made against a whole body of men, such as lawyers, clergy or brewers, etc., this is not a libel upon any individuals of that class, and the

courts must so pronounce it. But if the words may by any reasonable application, import a charge against several individuals, under some general description or general name, the plaintiff has the right to go on to trial, and it is for the jury to decide, whether the charge has the personal application averred by the plaintiff. Certainty as to the person is to be judged of by the same rule as the certainty of the accusation. In the present case, it does not appear on the face of the declaration, that the accusation could not have a personal application, whilst the plaintiff avers that it was a charge against several individuals of which he was one. The generality of the description in this case is, therefore, in my opinion, not such as to afford sufficient cause for demurrer.¹⁷

[The court here refers to *Sumner v. Buel*, 12 Johns. 475 and criticizes it.]

Thus in *Foxcraft v. Lacy*, Hob. 89, Lacy had charged "the defendants" in a certain suit with a crime. Those defendants were the plaintiff, Foxcraft, and sixteen others; yet it was held that this charge was "sufficient to entitle every one of the defendants to a several action, as if they had each been specially named." This ancient case has been repeatedly recognized as sound law in later times, and it was on its authority that several decisions in our own Supreme Court have been made. Thus in *Gidney v. Blake*, 11 Johns. 54, the slander was this: "Your children are thieves and I can prove it." *Per curiam*. The charge is not vague. The words "your children" embrace all the children of *Gidney*; and the case in *Hobart* was cited as the governing authority.

I have accordingly no doubt that the present decision of the Supreme Court ought to be reversed. I hold that a declaration on libel cannot be adjudged insufficient, by reason of the accusation being directed against a class of society, unless it is manifest and unquestionable, that the charge is clearly made against a class of society or an order or body of men as such, and cannot possibly import any personal application tending to private injury. If to the common understanding of men, the description evidently points to several individuals, or if on the face of the declaration it appears that the words are capable of being so meant and understood, then the fact of a person being defamed under a description of office or of profession, common to himself and other individuals included in the same libel, cannot take away the right of private action.

I consider it important to the best interest of society to maintain this principle. A contrary doctrine would give great im-

¹⁷ That is, on the face of the pleadings the case made out by the plaintiff would appear to be sufficient.

punity to the libeler. All men prominent enough to become objects of malignant attack through the press are likely to belong to some class of officers, professions, etc., and can be easily described and identified in that manner without being named. The present case happily furnishes a favorable opportunity to establish this principle, without being embarrassed by any peculiarities of the facts or the admixture of prejudices, with the consideration of the legal principles to be decided. So far as we can judge upon the probable result of this case before a jury, from the printed report of a trial on the same alleged libel, there is no great probability of further litigation; and the defendant is free from any imputation of personal malice in a moral point of view, however he might be held legally liable to respond in damages, were he incapable of establishing the truth of his charges.

Upon the question being put—shall this judgment [i. e., judgment of the trial court for the defendant] be reversed?—the members of the court divided as follows:

In the affirmative—Senators Furman, Hawkins, Hunt, Livingston, Moseley, Nicholas, Root, Skinner, Tallmadge, Verplanck—10.

In the negative—The Chancellor, and Senators Clark, Dixon, Ely, Paige, Peck, Van Dyck, Wager, Works—9.

Whereupon, the judgment of the Supreme Court was reversed.¹⁸

THE CHANCELLOR (dissenting). * * * [Page 196.] There are many cases in the books where the writers and publishers of defamatory charges, reflecting upon the conduct of particular classes, or bodies of individuals, have been proceeded against by indictment or information, although no particular one was named or designated therein to whom the charge had a personal application. All those cases, however, whether the libel is upon an organized body of men, as a Legislature, a court of justice, a church, or a company of soldiers, or upon a particular class of individuals, proceed upon the ground that the charge is a misdemeanor, although it has no particular personal application to the individual of the body or class libeled, because it tends to excite the angry passions of the community, either in favor of, or against the body or class in reference to the conduct of which the charge is made, or because it tends to impair the confidence of the people in their government or in the administration of its laws.

¹⁸ Compare *Sumner v. Buel*, 12 Johns. (N. Y.) 475 (1815) holding that a civil action for damages does not lie by an officer of a regiment of militia, for a publication reflecting upon the officers of the regiment generally, without averring a special damage. The court divided 3 to 2.

The following extract is from the majority opinion by Thompson,

SECTION 2.—PUBLICATION

1. **Meaning.**—Publication consists of the communication of the defamatory matter. It is neither a crime nor a tort to think evil thoughts of another, nor even to indite scandalous imputations, if one does his own writing and locks the letter in his own safe, provided it remains there. It must be brought, through his own fault, to the attention of some one other than himself, in order to constitute a legal wrong. However, communication to one such person will suffice. A publisher's liability for what appears in his pa-

C. J.: "It is very difficult to lay down any precise and satisfactory rule on this subject; extreme cases may be stated on both sides of the question, on which no difference of opinion would be entertained, and which would yet seem to fall within the general rule. Had this publication applied to the officers of the army of the United States, or to the officers of the militia of the state of New York, or to the officers of the militia of any particular county, it would certainly not be pretended that each individual falling within the general description could maintain an action, and yet the libel by proper averments might be individually applied as well in those cases as in the one before us. So, a libelous publication generally against the bar of the state of New York, or of the city of New York, or of any particular county, would not give a private action to each individual of the profession within the respective districts of country, although a proper averment might apply it to each individual.

Numerous other cases of a similar nature might be put. It is not, therefore, the want of certainty as to whom the libel might be applied by necessary averments which prevents the maintenance of private suits, nor is it because the libel applies to an order of men, for, in some of the cases put, the application would be only to a portion of such order. But, if this be the principle upon which private suits in such cases are denied, the case before us falls within it; for the officers alluded to are a portion of the order or class of militia officers. There must, I think, be some other reasons which govern cases of this kind. The books are silent on the subject; and I know of none more sound and just than those I have already alluded to, that where the libel has no particular and personal application, and is so general that no individual damages can be presumed, and the class or individuals so numerous to whom it would apply, that great vexation and oppression might grow out of a multiplicity of suits, no private suit shall be sustained, but proceedings against the offender must be by indictment."

In *Lever v. Daily State Pub. Co.*, 123 La. 594, 49 South. 206, 23 L. R. A. (N. S.) 726, 131 Am. St. Rep. 356, a sweeping charge of favoritism concerning the board of administrators of Tulane University was held to be a libel on each member of the board, although not referred to specifically by name, since it referred to the whole board, and since the personnel of the board was well known to the public.

per may date at least from the reading of the first proof, if not from the time that the type is set. Of course, the measure of damages will vary with the extent to which it has been brought to the attention of others. But that is another story. Technically liability begins with the first communication.

2. Distinction Between the Civil and the Criminal Law Rule.—To sustain a civil action, that is to say, an action for damages, it must be proved that the communication was made, not to the defamed person alone, but to some third person. Unless it is seen by a third person, reputation is not affected, and there is no basis for an award of damages. But one is guilty of criminal libel, whether the matter be brought to the attention of an outsider or to the defamed person alone. This is because in either event it tends to a breach of the peace.¹⁹

YOUSLING v. DARE.

(Supreme Court of Iowa, 1904. 122 Iowa, 539, 98 N. W. 371.)

Action to recover damages for libel. Demurrer to plaintiff's petition was sustained, and, on failure of plaintiff to amend, judgment was rendered for defendant, from which plaintiff appeals. Affirmed.

MCCLAINE, J. The plaintiff sets out language of a defamatory nature contained in two letters sent to plaintiff by defendant, and the question which we need consider in the case is whether a written communication of libelous matter contained in a letter can be the subject of an action for damages sustained by the person to whom the letter was sent, there being no other publication. On this question there seems to be no conflict in authorities. The cases, so far as our atten-

¹⁹ In a few jurisdictions it is provided by statute that one may be guilty of criminal libel, even though there be no actual communication to anyone. The California statutory provision is typical. Pen. Code Cal. § 252: "To sustain a charge of publishing a libel, it is not needful that the words or things complained of should have been read or seen by another. It is enough that the accused knowingly parted with the immediate custody of the libel under circumstances which exposed it to be read or seen by any person other than himself." See, to the same effect, Comp. Laws Utah, 1907, § 4200; Comp. Laws S. D. 1913, § 319; Rev. Codes Mont. 1907, § 8329.

tion has been called to them, uniformly hold that, in a civil action for libel, the sending of a communication containing defamatory language directly to the person defamed, without any proof that, through the agency or in pursuance of the intention of the sender, it has come to the knowledge of any one else, does not show such publication as to render the sender liable in damages. *Wilcox v. Moon*, 64 Vt. 430, 24 Atl. 244, 15 L. R. A. 760, 33 Am. St. Rep. 936; *Spaits v. Poundstone*, 87 Ind. 522, 44 Am. Rep. 773; *Fonville v. McNease*, Dud. 303, 31 Am. Dec. 556; *Odgers, Libel & Slander*, 150.

Counsel for appellant [i. e., the plaintiff] contends, however, that by Code, § 5090, the communication of libelous matter to the party libeled constitutes a publication thereof for the purposes of the criminal law, and as it is, therefore, a criminal act to send such a communication to another, there is a right to recover damages therefor on the part of the person injured. It is true that we have held that the definition of libel found in Code, § 5086, defining a criminal libel, is applicable in a civil action to recover damages, so that a communication such as is criminally libelous may be made the basis of an action for civil damages without proof of special damage. *Call v. Larabee*, 60 Iowa, 212, 14 N. W. 237; *Halley v. Gregg*, 74 Iowa, 563, 38 N. W. 416. But we have never held a publication [i. e., the act of communicating] which is sufficient to charge one with criminal liability to be necessarily sufficient to show damage as a basis for civil liability.

The difference between the criminal law and the law of torts [i. e., the law pertaining to a civil action] in this respect is manifest. The act of publishing a libel may be criminal, for the reason that it provokes the person libeled to wrath, and tends to create a breach of the peace. 1 Bishop, *New Crim. Law*, § 591 (4); 2 McClain, *Crim. Law*, § 1055. But in a civil action it is essential that some damage to the person libeled shall appear, either directly or by legal inference, and no such inference can be drawn from the communication of the libelous matter to the very person concerning whom the language was used. Such a distinction is illustrated by the statutory provision as to the publication of libelous matter respecting one who is deceased. Such a publication may constitute a crime (Code, § 5086), but cannot form the basis of an action for civil damages in behalf of any person. *Bradt v. New Nonpareil Co.*, 108 Iowa, 449, 79 N. W. 122, 45 L. R. A. 681. The statutory provision that publication to the person libeled is sufficient in criminal cases was, no doubt, adopted for the purpose of settling a question which, under

common-law authorities was perhaps in doubt. Warnock v. Mitchell (C. C.) 43 Fed. 428.

The judgment of the lower court [for the defendant] is therefore affirmed.

PRESCOTT v. TOUSEY.

(Superior Court of New York, 1884. 50 N. Y. Super. Ct. 12.)

Appeal by defendant from a judgment in favor of plaintiff, and also from an order denying a motion for a new trial.
* * *

TRUAX, J. The words set out in the complaint imputed a lack of chastity in the plaintiff, and were libelous.

At the close of the plaintiff's case, the defendant moved to dismiss the complaint, on the ground that the plaintiff had failed to prove a publication; the motion was denied, and the defendant excepted. * * *

A libel is published when it is communicated to some person, other than the plaintiff, who understands it, and not until then.

There is no presumption of law that every newspaper and every part thereof is read. The plaintiff must show, by evidence, that some one read the libel in some one of the papers that the defendant "published." In other words, before she can recover she must show that the defendant did *in fact*, publish the libel. This she failed to do. The complaint should have been dismissed on the ground that the plaintiff had failed to prove publication. * * *

The judgment [for the plaintiff] must be reversed.²⁰

²⁰ The statement of facts, part of the opinion by Truax, J., the concurring opinion by Ingraham, J., and the dissenting opinion by Sedgwick, C. J., are omitted. It will be noted that the decision is that judgment should have been for the defendant, since it was not proved that anyone had read the article.

Note.—The reading of the article by the typesetter or by the proof-reader would be sufficient publication to sustain even a tort action. As a practical matter, however, the wider the circulation, the greater the probability that suit will be brought, and the larger the damages that will be assessed, if suit is brought.

SECTION 3.—JUSTIFICATION

A. TRUTH

Points Involved.—A. published the following statement concerning B.: “B. is a thief. He stole X.’s black horse.”

1. Suppose that B. sues A. for libel. Will A. escape liability if he proves that the statement was true, or must he, in addition, prove that the story was published with good motives and for a justifiable end?

2. Suppose that A. is prosecuted for criminal libel. Would his defense of truth be the same as in Case 1?

3. Would A. fail in his defense, if the proof showed that B. had in fact stolen a horse, but that it was white, instead of black, or that he in fact stole a cow, instead of a horse?

1. Meaning of Justification.—Many of the questions pertaining to libel fall logically in this category.

The term “justification” has a very real significance, and in order to render clearer several of the sections which follow it will here be fully explained.

Every problem in the law of libel should be approached from the standpoint on one hand of “prima facie case,” and on the other of “justification.” The first question to answer is whether the facts give rise to a prima facie case for the plaintiff. This will depend, first, upon whether the words, or the caricature, as the case may be, fit the definition of libel as heretofore given, viz., hold the person up to public hatred, ridicule, or contempt, or are calculated to affect him in his trade, office, profession, or calling; and, second, upon whether they have been published, as previously explained. If these questions are answered in the affirmative, it is said in legal parlance that the plaintiff has made out a prima facie case. If this point is reached in a legal proceeding, and no further steps are taken by either party, judgment for at least nominal damages will be awarded to the plaintiff. It is not necessary for the plaintiff, as part of his case, to prove either the falsity of the imputations, or bad faith on the defendant’s part, or any specific pecuniary loss to himself. The next move is obviously up to the de-

fendant, if he would escape liability. He may exonerate himself by establishing a legal justification or excuse.

The following sections are devoted to a consideration of those matters which in the course of the development of the law of libel (and slander) have been presented to the courts by way of excuse or justification. The reader will need to note with care which of the various excuses brought forward have been considered sufficient in point of law to relieve the defendant in whole or in part of legal liability, and the reasons assigned for their acceptance; also, which of them have been rejected as insufficient, and the reasons therefor.

The matters to be considered are grouped under the following headings: (1) Truth. (2) Good Faith—Innocent Mistake. (3) Repetition, as Distinguished from Origination. (4) Conditional or Qualified Privilege. (5) Fair Comment and Criticism. (6) Retraction.

2. Truth, Defensive in Character.—Where truth is of any avail, it is only by way of excuse or justification. It is no part of the complainant's *prima facie* case to prove the falsity of the defamatory statements. Assuming, then, that the defendant has published words or pictures which are in their nature defamatory, he may wish to take refuge in the fact that the imputations were true. If so, it is incumbent upon him to assert their truth by way of affirmative defense and thus to bear the burden of establishing his contentions. This procedural feature of the law of libel should always be borne in mind when defamatory charges are published, for it is one thing to believe strongly that charges are true, or even to know that they are true, and frequently quite another thing to be able to prove their truth to a legal tribunal. The practical admonition is therefore that great care should always be exercised in running charges down to their original sources, and in making and laying away careful memoranda of persons who could act as witnesses in case an action should later be instituted. Rumor and legal evidence have nothing in common. Hearsay is not evidence in a court of law. Persist to the farthest practicable extent in getting at the basic truth.

3. How Far Truth is a Defense to a Criminal Prosecution for Libel.—One's first guess, when presented with this question, would probably be that truth, if established, is always a complete defense. But this is not the law. Strange as it may seem, the time was when, quite to the contrary, truth was no defense at all to a criminal prosecution for libel. The maxim was, "The greater the truth, the greater the libel;" for it was even more calculated to cause a breach of the peace than if it were false. If the charge were true, what could the defamed person do, other than defend himself and retaliate by blows? But this extreme doctrine was changed in due course by Fox's Libel Act, wherein it was provided that the truth should be a defense to any criminal charge, provided, however, that it was published in good faith and for justifiable ends. And thus the law of criminal libel stands to-day. Even now, not truth alone, but truth plus good motives and justifiable ends, will protect from the toils of the prison or the pains of the penal fine.

4. How Far Truth is a Defense to a Civil Action for Libel.—The historical answer to this question is just the reverse of that given to the question of the previous section. At the early common law truth alone was a complete defense to a civil action for damages. It was contended on behalf of the defendant that, if the plaintiff lost a good reputation by reason of charges that were true, he had suffered no legal harm; that he had not been deprived of anything to which he was either morally or legally entitled. This argument won. The rule of the common law is the rule generally followed to-day.

But this is not the law in all the states. In a few jurisdictions the criminal law rule is applied also to the civil action. Such states recognize the possibility of reformation in one who once may have slipped, and believe that a good reputation built thereon should not be needlessly and ruthlessly torn down. They have no sympathy, therefore, for the newspaper that is bent on dragging the skeleton from the family closet, with no other motive than its thirst for scandal. In these states the rule is that truth will pro-

tect against the civil as well as the criminal action only when it is fortified by proof that the tale was published with good motives and for justifiable ends. The minority rule has much of fairness and sound public policy to commend it. It has become established, however, in only six states, viz. Illinois, Maine, Massachusetts, Nebraska, New Hampshire, and West Virginia.²¹

5. What is the Truth?—The cases would indicate that the oath of a witness to tell the truth, the whole truth, and nothing but the truth, contains the safest guiding principle for the journalist. Exaggeration may easily be construed as departure from truth, and hence as falsehood. For example, it has been held that the defense of truth was not sustained, where the defendant charged that the plaintiff had knocked out his horse's eye, but proved that the eye was badly injured, and not literally knocked out.²²

The law is that the plea must justify the charge alleged; it is not sufficient to set up a charge of the same general nature. It has even been held that a charge that a person stole a dollar from one person cannot be justified by proof that he stole that amount from another.²³ The defendant cannot justify a charge of horse stealing by proof that the person stole a hog or a cow.²⁴ A charge that the plaintiff, as a journalist, was in the habit of libeling others is not sustained by proof of a single instance of libeling.²⁵ Charging that the plaintiff has made his name notorious involves a departure from the truth, when the proof only shows that the plaintiff was unpopular.²⁶

On the other hand, it is not every slightest departure from the literal truth that spells disaster. A mistake of a week in stating the term of imprisonment of an offender is not necessarily fatal. In passing upon such a case the English court said the test was whether the statement was so inaccurate as to be calculated to have a different effect upon

²¹ See references, *infra*, p. 59. note 32, and page 68, note 36.

²² *Weaver v. Lloyd*, 2 Barn. & C. 678, *infra*, p. 69.

²³ *Gardner v. Self*, 15 Mo. 480.

²⁴ *Dillard v. Collins*, 25 Grat. (Va.) 343.

²⁵ *Wakley v. Cooke*, 4 Exch. 511.

²⁶ *Remsen v. Bryant*, 36 App. Div. 240, 56 N. Y. Supp. 728.

the public than the literal truth would have had.²⁷ This test seems like a rational one, but in the light of the decided cases it must be applied with great caution, and should not be accepted as a really safe general guide. Some of the cases stated above cannot be reconciled with it.

A few of the more liberal cases are as follows: A statement that the plaintiff stole certain cotton was held in a recent Texas case to have been justified by proof that he stole other cotton. The court said that the gravamen of the charge was that the plaintiff was a thief, and that the defendant's proof established that fact.²⁸ Again, a Missouri court held that an accusation that the plaintiff was indebted for beer and a loan was sustained by proof that he was in fact indebted for a loan of a smaller amount.²⁹ And the appellate court in California decided that the departure from the truth was not material, where the charge was that plaintiff, upon hearing of the death of President McKinley, asserted that the latter ought to have been killed, and that plaintiff was arrested for making such statement and placed in jail, but the proof failed as to everything except the alleged utterance. "The utterance," said the court, "was the sting or gist of the libel."³⁰

6. The Meaning of the Words versus the Meaning of the Writer.—A person is held accountable in libel, not merely for what he meant to say, or what he meant by what he said, but rather for what his readers would, under all the circumstances, naturally infer that he meant. It is the truth or falsity of the statement in the latter sense that is in issue. " * * * The inquiry of a judge or jury is not confined to the secret thought of the defendant, but to the effect of his utterance, upon the plaintiff's reputation; and that effect is to be determined by the sense, which readers or hearers of common and reasonable understanding would ascribe to it."³¹

²⁷ *Alexander v. Northeastern Railway Co.*, *infra*, p. 70.

²⁸ *Quaid v. Tipton*, 21 Tex. Civ. App. 131, 51 S. W. 264.

²⁹ *Windisch-Muhlhauser Brewing Co. v. Bacon*, 21 Ky. Law Rep. 928, 53 S. W. 520.

³⁰ *Skrocki v. Stahl*, 14 Cal. App. 1, 110 Pac. 957. For a full collection of the authorities, see 31 L. R. A. (N. S.) 136-147, note.

³¹ *Burdick*, Torts (3d Ed.) § 362.

CONSTITUTION OF ILLINOIS

Article II, § 4: “* * * in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.”³²

CASTLE v. HOUSTON.

(Supreme Court of Kansas, 1877. 19 Kan. 417, 27 Am. Rep. 127.)

HORTON, C. J.³³ This was an action commenced in the district court of Leavenworth county, to recover damages for libel. The petition alleges in substance, that the defendant was editor, proprietor, and publisher, of the Leavenworth Daily Commercial, a newspaper printed in the city of Leaven-

³² For similar constitutional or statutory provisions in criminal cases see: *England* (E. I.) 6 & 7 Vict. c. 96, § 6; *Arkansas*, Kirby & Castle's Dig. § 1980 (truth alone); *Arizona*, Pen. Code 1913, § 224; *California*, Pen. Code 1909, § 251; *Colorado*, Rev. St. 1908, § 1761 (truth alone a defense); *Delaware*, Rev. Code 1915, § 4217; *Florida*, Const. Declaration of Rights, preamble, § 13; *Idaho*, Rev. Code 1907, § 6740; *Indiana*, Burns' Ann. St. 1914, § 55, also Const. art. 1, § 10 (truth alone); *Iowa*, Code 1897, § 5088, also in Const. art. 1, § 7; *Kansas*, Gen. St. 1915, § 3769, also section 11 of Bill of Rights; *Louisiana*, Marr's Ann. Rev. St. § 2329; *Maine*, Const. art. 1, § 4 (differing somewhat from the above); *Massachusetts*, Rev. Laws 1902, c. 219, § 8 (truth a defense, unless actual malice proved); *Michigan*, Const. art. 2, § 18; *Minnesota*, Gen. St. 1913, § 8464; *Mississippi*, Hemingway's Code, § 1008, and article 3, § 13 of the Constitution; *Missouri*, Rev. St. 1909, § 4821, and article 2, § 14, of the Constitution (truth alone a defense); *Montana*, Rev. Code 1907, § 8328; *Nebraska*, Rev. St. 1913, § 7700, and article 1, § 5, of the Constitution; *Nevada*, Rev. Laws 1912, sec. 6428 and Art. 1, § 9 of the Constitution; *New Mexico*, Code 1915, § 1733, and article 2, § 17, of the Constitution (truth a defense in certain specified instances); *New York*, Const. art. 1, § 8; *New Jersey*, 2 Comp. St. 1709-1910, p. 2228; *North Carolina*, Pell's Revisal 1908, § 3267 (truth alone a defense); *North Dakota*, Comp. Laws 1913, § 9552; *Ohio*, Page & A. Gen. Code Supp. § 11342 (truth alone), and article 1, § 11 of the Constitution; *Oklahoma*, Rev. Laws 1910, § 2383, and article 2, § 22 of the Constitution; *Oregon*, L. O. L. 1910, § 2387; *Pennsylvania*, Purdon's Dig. 1909, p. 225, § 1; *South Carolina*, Cr. Code 1912, p. 602, and article 1, § 21, of the Constitution; *South Dakota*, Comp. Laws 1913, p. 22, article VI, § 5, of the Constitution, and section 318 of Penal Code; *Tennessee*, Shannon's Code 1917, § 6661, and article 1, § 19, of the Constitution; *Utah*, Comp. Laws 1907, §§ 4197 and 4199, and article 1, § 15, of the Constitution; *Vermont*, Pub. St. 1906, § 2267 (truth alone sufficient); *Virginia*, Code 1904, § 3375; *Washington*, Rem. & Bal. Code, § 2157; *West Virginia*, Const. art. 3, § 8; *Wisconsin*, article 1, § 3, of the Constitution; *Texas*, Vernon's Ann. Pen. Code 1916, § 1177. Unless otherwise provided by statute

³³ Part of the opinion is omitted.

worth, and that on the 20th of January, 1875, there was published in the said paper, of and concerning the plaintiff, a certain false and malicious libel, in words as follows, to wit:

"The insurance department of our state will in all probability be subject to a thorough investigation, as a bill has already been introduced into the Senate to investigate. This is right. Every insurance company in the state is willing an investigation be had. Mr. Russell, ex-superintendent, invites it, and the present superintendent is anxious for the same.

"There is a cadaverous-looking individual of Leavenworth loafing around here, who seems exceedingly anxious for an investigation, in hopes that the superintendent will be done away with and the department presided over by the auditor. A clerkship in the dim distance makes him enthuse. I cannot blame Castle much, knowing that board and other bills too numerous to mention have been pressing him for some time, and then doubtless the Northwestern Life would be glad to hear from him as he was published as a defaulter to that company. He is one of the most promising individuals (to his landlords) I know of, and the cry of fraud from such a completely played-out insurance agent has but little bearing with an intelligent body of legislators. If his caliber was as large as his bore, he would be a success. Jack."

In answer to the petition, defendant set up three defenses: * * * Second, * * * that the several matters and things in the article, complained of as defamatory, were true, and published for justifiable ends and purposes. * * * When the case came on for trial, it was submitted to a jury, and plaintiff obtained a verdict for \$1,250, whereupon defendant gave notice of motion for a new trial, which was filed, and after being argued was by the court sustained, upon the ground that the court had erred in its instructions to the jury. The plaintiff excepted, and has brought the case here for review.

It appears from the record that the court below granted the motion for a new trial on the ground that the jury was misdirected by the following instructions, viz.:

"The fact of the language being true is not alone an answer to the charge, but can only be shown in mitigation of damages.

or by Constitution, truth alone will constitute a complete defense to the civil action for libel. The following states require either good motives, or good motives and justifiable ends, in addition to truth, in civil as well as in criminal cases: *Illinois*, as indicated above in Constitution; *Maine*, Rev. St. c. 84, § 42; *Massachusetts*, Rev. Laws, c. 173, § 91; *Nebraska*, Const. art. 1, § 5; *West Virginia*, Const. art. 3, § 8. In New Hampshire the common-law rule requires good motives and justifiable ends. See *Hutchins v. Page*, 75 N. H. 215, 72 Atl. 689, 31 L. R. A. (N. S.) 132 (1909).

"It is not a defense simply to show the truth of the matter published, but the party must go further, and show that it was not only true, but that he acted with good motives and for a justifiable end, and that he had some purpose in view that was justifiable. If that be the case, if he acts honestly for good purposes and for justifiable ends, and what he says is true, then he is to be excused or acquitted."

[The question is thus squarely raised whether, in a civil action for libel, truth alone is a complete defense, or whether the defendant must also have acted with good motives and for a justifiable end.]

In this condition of the case, we must first inquire whether the instructions above set forth were improperly given on the trial. If erroneous as a statement of the law controlling the case, they certainly may have misled the jury. If correct in principle, and applicable under the issues presented, the court erred in granting a new trial for the reason given. An examination of this question will lead to a brief review of the law of libel in both criminal and civil prosecutions, so far as to consider and determine when a defendant may be permitted to give the truth in evidence as a full justification of alleged libelous matter.

It was at one time the rule of the common law, that the truth of the charge, however honorable and praiseworthy the motives of the publisher, could not be given in evidence in a criminal prosecution. Hence originated the familiar maxim, "The greater the truth the greater the libel." This doctrine was based upon the theory, that where it was honestly believed a particular person had committed a crime, it was the duty of him who so believed or so knew, to cause the offender to be prosecuted and brought to justice, as in a settled state of government a party grieved ought to complain for an injury to the settled course of law; and to neglect this duty, and publish the offense to the world, thereby bringing the party published into disgrace or ridicule, without an opportunity to show by the judgment of a court that he was innocent, was libelous; and if the matter charged was in fact true (thereby insuring social ostracism), the injury caused by the publication was much greater than where the publication was false. A false publication, it was contended, could be explained and exposed; a true one was difficult to explain away. As an additional reason for this rule, it was also held that such publications, even if true, were provocative of breaches of the peace, and the greater the truth contained therein the greater the liability of hostile meetings therefrom. That this was the true rule of the common law has been denied by many of the ablest jurists in both England and Amer-

ica, who maintained that the liberty of the press consisted in the right to publish, with impunity, truth, with good motives and for justifiable ends, whether it respected government, magistracy, or individuals. It certainly was derived from the polluted source of the Star Chamber, and was considered at the time an innovation, but like some other precedents, although arbitrarily and unjustly established, it came to be followed generally by the courts, and sustained as the law of the land. In 1804, in the state of New York, this principle of law was recognized and asserted in the case of *People v. Croswell*. In that case the defendant was prosecuted for libel for having published in his newspaper, at Hudson, in that state, called the *Wasp*, the charge against Thomas Jefferson, then President, that he (Jefferson) paid Callender for calling Washington a traitor, a robber, and a perjurer. The defendant, through his counsel, Alexander Hamilton, applied to the judge at the circuit to put off the trial to obtain the testimony of Callender to prove the publication true. Lewis, C. J., presiding, denied the motion, because the testimony was inadmissible, as the truth of the facts charged as libelous did not amount to a complete justification, 3 Johns. Cas. (N. Y.) 337. This case attracted so much attention that, after a verdict of guilty had been rendered, and while the case was pending in the courts of New York on a motion for a new trial, the Legislature of that state passed a law providing that, in every prosecution for writing or publishing any libel, it should be lawful for the defendant, upon the trial, to give in evidence, in his defense, the truth of the matter contained in the publication charged as libelous, and that such evidence should not be a justification, unless it should be further made satisfactorily to appear that the matter charged as libelous was published with good motives and for justifiable ends. Since the adoption of the New York statute declaratory of the law of libel in criminal actions, nearly every state in the Union has made the subject a matter of constitutional or statutory provision. The wise framers of our own Constitution, peculiarly acquainted with the beneficial influences of free discussion and a free press, as participants in the historical incidents and conflicts surrounding the settlement of the territory of Kansas, modified the tyrannical and harsh rule of the common law as stated in the Star Chamber of England, and thereafter generally understood and interpreted, by providing in section 11 of our Bill of Rights that—

“The liberty of the press shall be inviolate; and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel, the truth may be

given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted."

Nevertheless, these framers, in a spirit of wisdom, and to preserve order, were careful not to give, as against the interests of the public, complete license even to the truth, when published for the gratification of the worst of passions, or to affect the peace and happiness of society. They prescribe that the *accused* should be acquitted, not on proof of the truth of the charge alone, but it should further appear the publication was made for justifiable ends. Following the intentment of the Constitution, the Legislature afterward provided in the act relating to crimes and punishments that—

"In all prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury, and if it appears to them that the matter as charged as libelous was true, and was published with good motives and for justifiable ends, the defendant shall be acquitted." Section 272, Gen. Stat. 376.

But the lawmakers, jealous of the liberty of the press, and fearing the construction of the law by the courts in such prosecution, further provided, in a succeeding section of the same act, that—

"In all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine at their discretion, the law and the fact." Section 275, Gen. Stat. 377.

While the rule of the common law, as generally applied, was so exacting and rigorous to the defense of justification in criminal prosecutions for libel, a different doctrine was applicable in civil cases. * * *

Blackstone, in his Commentaries, asserts that the truth could always be given in civil cases in justification of libel, and seems to consider the defendant's exemption in such instances as extended to him in consideration of his merit in having warned the public against the evil practices of a delinquent. He says that it is *damnum absque injuria* [i. e., damage without legal wrong], intimating that the acts of the defendant, who justifies a libelous publication, do not constitute a wrong in its legal sense, and then proceeds to observe that this is agreeable to the reasoning of the civil law. 3 Bl. Com. 125. This is illogical; and Starkie bases this exemption on the better reason, that in such instances the plaintiff has excluded himself from his right of action at law by his own misconduct, and not to any merit appertaining to the defendant. When a plaintiff is really guilty of the offense imputed, he does not offer himself to the court as a blameless party, seeking a remedy for a malicious mischief; his original misbehavior taints the whole transaction with which it

is connected, and precludes him from recovering that compensation to which all innocent persons would be entitled. Folkard's *Starkie on Slander and Libel* (Am. Ed.) § 692.

There are many good and sufficient reasons why a publisher of a statement, true in fact, yet given to the public with a malicious design to create mischief, should be amenable to the criminal laws, and not be liable in a civil action. On general principles, no right to damages can be founded on a publication of the truth, from the consideration that the reason for awarding damages in every such case fails. The right to compensation in point of natural justice is founded on deception and fraud, which have been practiced by the defendant to the detriment of the plaintiff. If the imputation is true, there is no deception or fraud, and no right to compensation. The criminal action in libel is supported to prevent and restrain the commission of mischief and inconvenience to society. Take the case of two men who agree to engage together in fisticuffs: The law for the protection of the peace of society, and to prevent greater collisions, may arrest and punish both combatants, and yet neither may be able to recover from the other personal damages. Where a person makes the publication solely to disturb the harmony and happiness of society, or to maliciously annoy and injure the feelings of others, or to create misery by exposing the latent and personal defects of associates or acquaintances, the interests of the public require some preventive, notwithstanding the truth of the publication. This is furnished by the criminal law. But mere injury to the imagination or feeling, however malicious it may be in its origin, or painful in its consequences, is not properly the subject of remedy by an action for damages. Such offenses, being unconnected with any substantive right, are incapable of pecuniary admeasurement and redress. They admit of no exact definition, and therefore to extend a remedy to such injuries generally would be productive of great uncertainty and inconvenience, and open far too wide a field of litigation. Again, it seems to be clear that a party who acquires an advantage by concealing the truth, which he could not have attained to, had he divulged it, so far is guilty of fraud in the concealment that he cannot upon any principle claim a right to acquire that benefit, and therefore cannot complain that he is injured by the publication of the truth. *Starkie*, 35. In this view the truth hurts no one. * * *

From our review of the authorities, the provision of our Constitution, the Civil and Criminal Codes, we deduce these important principles:

First. In all criminal prosecutions, the truth of the libel is no defense unless it was for public benefit that the matters

charged should be published; or, in other words, that the alleged libelous matter was true in fact, and was published for justifiable ends; but in all such proceedings the jury have the right to determine at their discretion the law and the fact.

Second. In all civil actions of libel brought by the party claiming to have been defamed, where the defendant alleges and establishes the truth of the matter charged as defamatory, such defendant is justified in law, and exempt from all civil responsibility. In such actions the jury must receive and accept the direction of the court as to the law.

Under this view, the court below misdirected the jury in a very material point, and properly, on attention being again called to the matter by a motion for a new trial, granted such motion, and set the case again for hearing. The instructions given might have been applicable in a criminal proceeding, where the motive of the publication is important, and where the jury have the right to determine the law as well as the fact, but were erroneous in a civil action, where the facts charged were proved in justification. The instructions assumed that the truth is not a full and complete defense, unless it was shown to have been published for good purposes and justifiable ends. This is not correct. If the charges made by the defendant are true, however malicious, no action lies. *Root v. King*, 7 Cow. (N. Y.) 613, 632; *Townsend on Slander and Libel*, § 211; *Foss v. Hildreth*, 10 Allen (Mass.) 76; *Baum v. Clause*, 5 Hill, 196; 1 Starkie on Slander, 229; *Rayne v. Taylor*, 14 La. Ann. 406. * * *

The order of the district court, setting aside the verdict of the jury in the case and granting a new trial, is affirmed.

All the Justices concurring.³⁴

WERTZ v. SPRECHER.

(Supreme Court of Nebraska, 1908. 82 Neb. 834, 118 N. W. 1071, 17 Ann. Cas. 758.)

ROOR, C.³⁵ Plaintiff is a duly licensed attorney at law residing in Colfax county, and has been engaged in the active practice of his profession for some years past. In 1903 he was elected county attorney for said county. Thereafter defendant published in his newspaper the following article of and

³⁴ The holding, therefore, is that in a civil action truth alone is a complete defense; the question of motive being immaterial. In the criminal case only does the motive of the defendant figure. In England and in the great majority of the states this distinction is observed.

³⁵ Part of the opinion is omitted.

concerning plaintiff: "County Attorney Wertz for the prosecution and George W. Wertz for the defense get together and agree upon a compromise and the wise county board upon motion duly made, seconded and carried, endorse it. Oh, this official service in Colfax county is great."

Plaintiff brought this action, alleging that said statement was false and maliciously made; that thereby defendant charged him with improperly and corruptly acting in the interests of an individual client against Colfax county; and that he was guilty of unprofessional conduct and malfeasance in office. Defendant admitted that plaintiff was a duly licensed attorney at law in Nebraska and county attorney of Colfax county, and that defendant published said article, but alleged that the same was true, and denied all other statements in the petition. Upon motion defendant answered with particularity that preceding plaintiff's election he had represented one Dunkle in resisting a claim of Colfax county; that, after plaintiff's election, he represented both Dunkle and said county in compromising said demand and represented Dunkle in filing a confession of judgment in favor of the county for the amount of that compromise. Plaintiff replied, denying all allegations in the answer.

* * * publication was libelous per se, to which defendant did not except, nor complain in this court, so that we will accept the interpretation of the learned trial judge. Plaintiff in a motion for judgment on the pleadings, by objections to the introduction of defendant's evidence, by moving for a verdict by excepting to the instructions, challenged the sufficiency of said answer. The court * * * instructed the jurors that, if they found from the evidence that the statements in the publication were true, they should find for the defendant. Defendant prevailed, and plaintiff appeals. * * *

The fifth section of our present Bill of Rights reads: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." Now, if it was not the intention of the men who formed the constitutional convention in 1875 to compel the defendant in civil as well as criminal cases if he attempted to justify to prove good motives and justifiable ends as well as the truth of his charges in publishing a libel, the inclusion of the words "both civil" in the later Constitution was, and is, senseless and surplusage. * * *

Mr. Justice Horton in *Castle v. Houston*, supra [19 Kan. 417, 27 Am. Rep. 127], reasons that in a civil action the plaintiff by his own misconduct, if guilty of the offense imputed, has excluded himself from his action at law; that his original misbehavior taints the entire transaction with which it is con-

nected, and precludes him from recovering that compensation to which all innocent persons would be entitled; that, if the publication is malicious, although truthful, the criminal law will afford sufficient punishment for the guilty and example to the community. It is also true that convictions for criminal libel are rare, and that the individual does not control the machinery of the criminal courts. It is a further fact that individuals guilty of improprieties, indiscretions, or crimes it may be can, by subsequent observance of the laws of man and of God, win for themselves the respect and confidence of their associates and of the community. It is repugnant to the crudest ideas of justice to say that, under such circumstances, the truth of a recital of past history ought to entitle a defendant to a verdict in a civil action. If the truth of the article is alleged, it should be received in mitigation of damages without regard to the motives of defendant or the end sought by the publication, but the truth alone ought not to be an absolute bar to recovery. * * *

We cannot justify ignoring a plain and unambiguous clause in the Constitution of our state. The constitutional conventions were not pioneers in this field. In Massachusetts prior to 1827 the defendant in a criminal prosecution for libel could not prove the truth of the publication as a justification, and in that year the Legislature provided by statute that in all such prosecutions the defendant might give in evidence the truth of the libel, but that such fact would not be a justification unless it was made to appear that the publication was with good motives and for justifiable ends. In 1855 the Legislature of that state further provided: "In every prosecution, and in every civil action for writing or publishing a libel, the defendant may give in evidence, in his defense upon the trial, the truth of the matter contained in the publication as libelous, and such evidence shall be a sufficient justification, unless malicious intention shall be proved." Held to apply to civil and criminal cases alike. *Perry v. Porter*, 124 Mass. 338.

In the Florida Bill of Rights it is provided: "In all criminal prosecutions or civil actions for libel the truth may be given in evidence to the jury, and if it should appear that the matter charged as libelous is true, but was published for good motives, the party shall be acquitted or exonerated." Mr. Justice Raney in *Jones v. Townsend's Administratrix*, 21 Fla. 431, 58 Am. Rep. 677, 679, in commenting on the opinion of Mr. Chief Justice Savage in *Root v. King*, 7 Cow. (N. Y.) 613, 628, says: "The liberty of the press will not be invaded by requiring the conductors of our presses to stand responsible for the truth of what they publish, nor, we will add, by requiring them

to show the same 'good motives' which the Bill of Rights requires of all."

In Maine the statute provides: "In a suit for writing and publishing a libel, evidence shall be received to establish the truth of the matter charged as libelous. If its truth is established it is a justification, unless the publication is found to have originated in corrupt or malicious motives." In *Pierce v. Rodliff*, 95 Me. 346, 50 Atl. 32, it was held that the statute had changed the common law in civil actions for libel, and that the truth of a publication was not in itself a defense therein. Sufficient has been said to demonstrate that the opinions filed in *Pokrok Zapadu P. Co. v. Zizkovsky* [42 Neb. 68, 60 N. W. 358] and *Neilson v. Jensen*, supra [56 Neb. 430, 76 N. W. 866], were sound and in accord with the Constitution of this state. In so far as the dictum in *Larson v. Cox* [68 Neb. 44, 93 N. W. 1011] is opposed to the earlier cases, it is not adopted but disapproved, nor was it ever law in this state. It follows that the learned district judge erred in holding that the answer of defendant was sufficient, and in instructing the jury to find for defendant if it found that the allegations in defendant's answer were true.

Other errors are assigned, but they will not be examined, as the foregoing is sufficient for the disposition of this case.

It therefore is recommended that the judgment of the district court be reversed, and the case remanded for further proceedings.

FAWCETT and CALKINS, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the case remanded for further proceedings.

Reversed.³⁶

³⁶ The holding, which is contrary to that of the Kansas Court in *Castle v. Houston*, 19 Kan. 417, 27 Am. Rep. 127, supra, is that in civil as well as criminal cases, the defendant will be held liable unless he can prove, not only that the charge was true, but also that it was published with good motives and for justifiable ends. See, in accord with *Wertz v. Sprecher*, 82 Neb. 834, 118 N. W. 1071, 17 Ann. Cas. 758, *Ogren v. Rockford Star Printing Co.*, 288 Ill. 405, 123 N. E. 587 (1919). See, also, constitutional and statutory references at the beginning of this topic. In the great majority of the states the Kansas rule is followed in civil cases, viz. that truth alone is a complete defense in a civil action for libel. The Nebraska rule, however, commends itself to reason. The authorities, with very few exceptions, are agreed that, upon a criminal prosecution, good motives and justifiable ends must accompany truth in order to excuse the defendant. In a few states, however, truth alone is a defense in a criminal action.

WEAVER v. LLOYD.

(Court of King's Bench, 1824. 2 Barn. & C. 678, 107 Eng. Reprint, 535.)

Case for a libel published in an Oxford newspaper. The paragraph set out in the declaration charged the plaintiff with brutal usage of a horse, in riding from Oxford to Abingdon, and after various particulars concluded as follows: "We learn that, on reaching Abingdon, the horse presented a most shocking spectacle, having one eye literally knocked out, besides being dreadfully lacerated and injured in various parts of its body. Being conscious that its condition would excite attention, he ordered the person who had the care of the horse not to let any one go into the stables." The defendant pleaded, first, not guilty; secondly, a justification, averring the truth of each particular of the statement; thirdly, that the matters contained in the supposed libel were true in substance and effect. Replication, *de injuria*. At the trial before Garrow, B., at the last Oxford assizes, the jury found a verdict for the plaintiff on the first plea, and as to the others, that two of the matters alleged were not true, viz., that the horse's eye, although much injured, was not literally knocked out, and that the plaintiff had not ordered that no person should be allowed to go into the stable to see the horse; but that the alleged libel was true in substance and effect. The learned judge then directed them to find a verdict for the plaintiff, and gave the defendant leave to move to enter a verdict in his favor, if the court should think the third plea supported by the evidence. The jury accordingly found a verdict for the plaintiff with 1s. damages.

W. E. Taunton now moved to enter a verdict for the defendant, and contended that the jury were warranted in finding that the alleged libel was true in substance and effect. The horse's eye was shown to be much injured, although the sight was not entirely destroyed, and the supposed order, not to admit any person into the stable was not any part of the libelous matter, it was therefore unnecessary to prove the truth of it. *Edwards v. Bell* [1 Bing. 403].

PER CURIAM. The defendant did not succeed in proving either of his special pleas. The second plea, which distinctly averred the truth of the two facts which were not proved, clearly was not supported, and the third plea alleging that the charge was true in substance and effect, must mean that each particular of the charge was true in substance. In the case cited, the passage not proved formed no ingredient of the charge against the plaintiff. Here, the statement that he knocked out the horse's eye imputed a much greater degree of

cruelty than a charge of beating him on the other parts of the body. If we were to hold this a sufficient justification, exaggerated accounts of any transaction might always be given with impunity.

Rule refused.³⁷

ALEXANDER v. NORTHEASTERN RY. CO.

(Court of Queen's Bench, 1865. 34 L. J. Q. B. 152.)

Action for libel. The plaintiff charged, as a libel upon him, a notice published by the defendants, which stated that the plaintiff had been convicted of an offense against the defendant's by-laws and fined, with an alternative of three week's imprisonment. The alternative period of imprisonment was in fact fourteen days.

COCKBURN, C. J.³⁸ It is a question for the jury whether the libel was in substance true; but we cannot say as a matter of law that the substitution of three weeks for a fortnight makes the statement libelous; and the jury will have to say whether the inaccurate statement would have a different effect on the public than the literal truth. * * *

PER CURIAM. COCKBURN, C. J., BLACKBURN, J., MEL-
LOR, J., and SHEE, J.

Judgment for the defendants.

B. GOOD FAITH—INNOCENT MISTAKE

Points Involved.—1. The defendant admits that the statement is false, but contends that he ought not to be held responsible, because he carefully investigated the facts, was thoroughly convinced that the statement was true, thought that the public ought to be advised of the rascality of their fellow townsman, and published it for that purpose, with no feeling of personal ill will for the plaintiff. Will the law excuse him?

2. The reporter writes a true and nondefamatory account and sends it by wire to the paper. The telegraph company makes a mistake of such character that, as delivered to the paper, the story is untrue and scandalous. The paper innocently publishes it. Is this an excuse that will relieve the paper of liability?

³⁷ Judgment for the plaintiff was sustained.

³⁸ Statement of facts is abridged and part of the opinion is omitted.

3. An accidental misprint, or an insertion of a wrong photograph, makes an otherwise innocent story defamatory. Is the publisher liable?

4. The paper publishes what it intends as a humorous bit of fiction, using the name, supposedly fictitious, Artemus Jones. The story appears to be genuine, and there happens to be in that vicinity a person known as Artemus Jones. Is the paper liable?

1. Good Faith and Innocent Mistake.—Neither good faith, i. e., good motives, nor an innocent and even non-careless mistake, standing alone, constitutes a defense or justification³⁹ in an action for libel. In other words, the general rule is that one publishes a false defamatory statement at his peril. An honest and reasonable conviction that it is true will not excuse one.

But honest purpose and reasonable care do relieve the defendant of the burden of punitive damages. If one is made to pay for the harm actually done, that is sufficient. Where there is honesty and care, there is no occasion for "smart money." That is reserved for one who acts carelessly or in bad faith. Also, as we shall find later on, if the occasion of the publication is conditionally privileged, the question of liability may finally turn upon the defendant's motives. But, in the ordinary case, good motives are not a legal justification.

2. Illustrations.—The cases which follow fully illustrate the rules as stated in the preceding paragraph. The cases involving innocent mistake are numerous. A few additional ones will here be given.

The San Francisco Examiner, owned by the defendant, published an article stating that one J. W. Taylor, who had a contract with the city to supply basalt blocks, had conspired with a city employee to defraud the city. It was proved at the trial that there was a John N. Taylor who had such a contract, and who had been guilty of fraud, and that by mistake and without malice the initial N. had been changed to W. Held, for the plaintiff. The court said:

³⁹ For an explanation of the title "Justification," see the prefatory note, *supra*, p. 54.

"The article here complained of was libelous per se. It charged J. W. Taylor with dishonesty and criminal conduct, and, according to plaintiff's undisputed testimony, must have been understood by his friends as applying to him. It is true it was made to apply to him by mistake, but that did not justify or excuse the publication. As said in the note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 339, where the authorities on the subject of libel are very fully reviewed: 'One who had published a libel on another cannot successfully resist the latter's action for redress, by showing he did not intend to publish it, and that its publication was due to carelessness, inadvertence, or mistake.' Hence it is not a sufficient defense that the publication of a libel resulted from an error in setting type.

"The correction or retraction published was properly pleaded and given in evidence, but it could operate only in mitigation of damages, and not as a full defense to the action."⁴⁰

In an attempt to report the arrest of a thief, the address of the plaintiff was given, instead of the address of the thief; the plaintiff's name being the same as that of the thief. The defendant was held responsible.⁴¹

A map was published showing disorderly houses in a certain part of New York City. By mistake the house occupied by the plaintiff was marked on the map as such a house, instead of the house next door, which it was intended to expose. Held, for the plaintiff.⁴²

The defendant newspaper published an article asserting that *John Clark*, a city employee, watchman in Starr Garden Park, was implicated in a burglary. The plaintiff, *James Clark*, was the watchman of the park; John Clark being a brother of James Clark. It was held that the judgment should be for the plaintiff, provided "the description was such, either intentionally or by want of due care and diligence in ascertaining the true facts, that there would be

⁴⁰ *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392 (1895).

⁴¹ *Davis v. Marxhausen*, 86 Mich. 281, 49 N. W. 50 (1891).

⁴² *McClellan v. New York Press Co.*, 64 Hun, 639, 19 N. Y. Supp. 262.

a natural and reasonable inference that the plaintiff was the person referred to.”⁴³

Plaintiff was named as one of six persons indicted by the grand jury for conspiracy, and described with particularity as to age, residence, and profession. The paper was mistaken as to the identity of the person indicted; the person actually indicted being, however, a person of similar name. Judgment was given for the plaintiff.⁴⁴

The fairly recent English case of *Jones v. E. Hulton & Co.*, [1909] L. R. 2 K. B. 444, is unusual on its facts. It shows forcibly the severity of the law. The *Sunday Chronicle* published an article which purported to describe in somewhat humorous style the unseemly conduct of one Artemus Jones, an Englishman, while visiting in France. Much to the surprise of the publishers, it was shortly made the defendant in a libel action by one whose baptismal name was Thomas Jones, but who from early boyhood had been known by the name of Artemus Jones, or Thomas Artemus Jones. It was alleged by the defendant and conceded by the plaintiff that to every one connected with the paper, including the writer of the article, the name Artemus Jones was entirely imaginary, and that there was no intention to refer to any one in particular, much less to the plaintiff, who was wholly unknown to them. In the trial court judgment was rendered for the plaintiff, and this was affirmed by the Court of Appeal, and finally by the House of Lords, but with certain of the judges dissenting in both appellate courts. Said the court: “* * * If a person chooses to publish a thing of this description, the question is, not whether the man really intended it, but whether it would be understood by readers to apply to a particular person. * * * If sensible readers would see at once that it was only an imaginary thing, if any one reading it would see that it did not refer to a gentleman who happened to bear the name of Artemus Jones, it would not be a libel; but, if he would think the contrary, that it did not refer to

⁴³ *Clark v. North American Co.*, 203 Pa. 346, 53 Atl. 237 (1902).

⁴⁴ *Sweet v. Post Publishing Co.*, 215 Mass. 450, 102 N. E. 660, 47 L. R. A. (N. S.) 240, Ann. Cas. 1914D, 533.

an imaginary person, but to a real individual, the action might be maintained. * * * What is passing in the mind of the writer is wholly immaterial, or what was his intention, if he has in fact published a libel upon the plaintiff." ⁴⁵

COX v. STRICKLAND et al.

(Supreme Court of Georgia, 1897. 101 Ga. 482, 28 S. E. 655.)

Action of libel, before Leon A. Wilson, Judge pro hac vice. Clinch superior court, April term, 1896.

Horace Cox sued Powell, Strickland, the Valdosta Times Publishing Company, and many others for publishing in the Valdosta Times, of and concerning him, certain resolutions, set forth in the declaration, in which, among other things, it was stated that, at a meeting of citizens of a certain district of Clinch county, a committee appointed to draft suitable resolutions reported that there had been a clandestine burning of property in that district; that the citizens were firmly of the opinion that Cox was either directly or indirectly connected with it, because of his having been accused of numerous cases of like nature, in the vicinity of Milltown, Berrien county, whence he came, and because of circumstantial evidence being so strong against him in the present case; that it was respectfully asked that R. S. Thigpen remove said Cox from his premises, the presence of Cox being detrimental and obnoxious to said citizens in the highest degree; that the Valdosta Times be furnished with a copy of the resolutions, together with the names of the citizens signing the same, with a request that the same be published in the Times, etc. These resolutions were adopted by the meeting, and signed by a large number of persons. * * *

Defendants pleaded not guilty. By the second paragraph of their plea they denied that they injured petitioner by falsely and maliciously publishing the resolutions set out in the petition. They admitted signing the resolutions and the publication of the same, "but the charges set out in the resolutions, and so expressed in them, were expressions of opinion by the de-

⁴⁵ See, in 60 Penn. Law Rev. 365, 461, a learned article by Professor Jeremiah Smith, approving the decision. Compare *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N. E. 462, 20 L. R. A. 856 (1893), in which the Globe was exonerated for referring by mistake to one H. P. Hanson as the defendant in a criminal case, whereas the defendant was in fact a H. P. H. Hanson. Justice Holmes, however, dissented.

defendants signing the same, and which were formed by them and so expressed in them, upon circumstantial evidence"; and, when they were so signed and published, each of defendants was entirely free from all malice and ill will towards plaintiff, and their feelings were so expressed in the resolutions; and the resolutions as signed and published have not damaged petitioner in any amount, and were published as an advertisement, for a valuable consideration, by the Valdosta Times. * * *

GOBER, J.⁴⁶ * * * 3. A newspaper is not privileged in its publications, but it is liable for what it publishes, in the same manner as any individual. *Campbell v. Spottiswoode*, 8 Law T. (N. S.) 201; *Davison v. Duncan*, 7 El. & Bl. (King's Bench) 231; *Sheckell v. Jackson*, 10 Cush. 26; *State v. Banner Pub. Co.*, 22 Reporter, 445; *Townsh. Sland. & L.* 447. The publication of defamatory matter is not privileged because published in the form of an advertisement, or as news, or because furnished by a correspondent, or is copied from other papers. *Robertson v. Bennett*, 44 N. Y. Super. Ct. 66; *Perret v. New Orleans Times*, 25 La. Ann. 170; *Harrison v. Pearce*, 1 Fost. & F. 567; *Thompson v. Powning*, 15 Nev. 195; *Malory v. Press Co.*, 34 Minn. 521, 26 N. W. 904; *Bathrick v. Tribune Co.*, 50 Mich. 629, 16 N. W. 172; *Townsh. Sland. & L.* 448. The right to publish through the newspaper press such matters of interest as may be properly laid before the public does not go to the extent of allowing the publication concerning a person of false and defamatory matter, there being no other reason or justification for so doing than the mere publication of the news. But false assertions, when they impute the commission of crime, are actionable; and, when not based upon any facts legally tending to prove the crime imputed, the publication cannot be said to be privileged. It will not do to say that such a publication was made with reasonable care, however good the motive may have been. *Newell, Defam.* p. 591, § 37.

In popular belief, one man can publish of another what he sees fit, if, by bluff or otherwise, he can avoid any personal consequences on account of such act. The party aggrieved must either submit or go gunning for the publisher, in order to retain his place in public estimation as a man of honor. Generally the libeler is not in evidence. His work is done behind the scene. You cannot always know his motive. Upon the surface he is the embodiment of fairness—of patriotism. Yea, sometimes his religious views almost deter him from the work he is about, but, patriot as he is, he will do the public a service, and often he strikes a better man than he is—a cowardly blow

⁴⁶ The statement of facts is abridged and part of the opinion is omitted.

though it be. "Character" is defined by Webster to be peculiar qualities impressed by nature or habit on a person, which distinguish him from others. The libeler would strip him of these. He wishes him to appear, not in his true character, but in a fictitious one—a character that he would give him. We can understand why a thief would steal; he is after gain. So forgery is committed, and other crimes. But, from a moral standpoint, a man who would destroy character must be ranked along with the felon who commits arson. He cannot hope to profit by it. He cannot appropriate that of which he deprives another. Character ought to be protected. The law ought to be enforced to protect it. I could not do better than quote just here from the preface to the letters of Junius:

"If the characters of private men are assailed or injured, a double remedy is open to them, by action and indictment. If, through indolence, false shame, or indifference, they will not appeal to the laws of their country, they fail in their duty to society, and are unjust to themselves. If, from an unwarrantable distrust of the integrity of juries, they would wish to obtain justice by any mode of procedure more summary than a trial by their peers, I do not scruple to affirm that they are, in effect, greater enemies to themselves than the libeler they prosecute."

A newspaper is a great power. There will doubtless appear no greater factor in the progress and development of our common country. Some men owe to the press the respect they exhibit for religion and morality. They fear its lash. The newspaper should discriminate. Upon its lofty pedestal it should command respect for its high-toned thought, its justice, its conservatism, and its moderation. The press should be free. It should not be deterred from its legitimate work. It leads thought. It molds public opinion. It thinks for the people. Some men have illustrated this great calling. They have appreciated its duties and obligations. They have lent an ear to the right. Their endeavors have kept time to the needs and necessities of the great millions who exemplify the virtue, religion, and morality of this country. The man that sits in this high place, athirst for greed and gain, whose opinions depend upon the amount of money he gets in his wallet, who attacks private character when he is paid to do so, is a usurper and a public enemy. As well might Judas Iscariot exhibit the price of his perfidy as an excuse for his crime as for a libeler to set up that he published the libel complained of for money. If this plaintiff is guilty of the acts published against him, these defendants had a right to publish them, and they did a public service in doing so. On the contrary, if he

is not guilty, and if it is an effort to defame and degrade him, the law should not withhold its vindication.

It is not intended to say how this case should be finally determined. Let it be presented to the jury under these rules, and let the truth prevail. Judgment [of the trial court for defendant] reversed.⁴⁷

UPTON v. TIMES-DEMOCRAT PUB. CO.

(Supreme Court of Louisiana, 1900. 104 La. 141, 28 South. 970.)

BREAUX, J.⁴⁸ Plaintiff sued the defendant for damages in the sum of \$5,000 for publishing a telegraphic dispatch in which it was stated that "Rev. Thos. J. Upton is a negro." It appears that at a meeting of the police jury of the parish of East Baton Rouge a petition was read by Rev. Upton, asking that body to order an election in that parish with a view of prohibiting the sale of intoxicating liquors. There was a counter petition presented by another resident of the parish in favor of the indefinite postponement of such an election. The Baton Rouge correspondent of the defendant company sent a telegraphic account of the meeting to that company for publication. The correspondent and representative of that newspaper in Baton Rouge, prompted by a desire to be complimentary to the Rev. Mr. Upton, stated in the dispatch that he (Upton, by whom the petition for an election was presented) was a cultured gentleman, and that his arguments in favor of an election were eloquently presented. In transmitting the dispatch a mistake was made. The word "cultured," as written by this correspondent, was changed to "colored"; and the dispatch read that a "colored gentleman," instead of a "cultured gentleman," had presented the petition. At the office of the Times-Democrat the words "colored gentleman" were changed to "negro," for the reason that the latter word is always used by that paper as the proper word. * * *

The judge of the district court pronounced judgment in favor of Thomas J. Upton and against the defendant, the Times-Democrat Publishing Company, for \$50, with interest from the date of the judgment. From the judgment, plaintiff prosecutes this appeal. * * *

[When the mistake was called to the defendant's attention, a retraction was published at once.] From the evidence before us, we meet with no difficulty in arriving at the conclusion

⁴⁷ The decision is that the fact that the defendants were not actuated by ill will or other malicious motives was not a legal excuse. They could only escape liability by proving that the story was true.

⁴⁸ Part of the opinion is omitted.

that the retraction and the apology were full and complete, and that they were as timely made as the occasion permitted. But retraction and apology, even when timely made, are not all that is needful to relieve a publishing company from liability; for injury resulting from oversight or negligence, even when there is no malice or evil intent, may give rise to liability in damages. A newspaper would yet be liable if an injurious untruth should find its way into its columns, though by the merest accident. The law seeks to protect the innocent who has been injured by libelous reports. The fact that a management may be [do] all that can be expected to guard against unfortunate accidents is not in itself a protection from damages and a sufficient defense.

This brings us to a consideration of the damages which should be allowed. There is no question of exemplary damages. Now, as to actual damages, they cannot in view of the facts, be assessed at any other than a very limited amount. The claim, after all, grows out of a mere mistake. * * * It was the publishing of a mistake for which the defendant was in no way responsible. We have to deal, as relates to damages, only with the real and actual, and not with the exemplary and punitive. In our view, the real injury sustained must have been very inconsiderable. The untruth published could not have had the least effect, even for a moment. To illustrate: If one who has marked moral character, great prestige, and austere probity is accidentally charged with having committed an improper act, the charge, as relates to actual damages, would have no great effect, or if, as in the case before us for decision, the name of one of well-known lineage should, by the merest accident, be characterized untruthfully, the actual damages would be inconsiderable.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed at appellant's costs [i. e., judgment for the plaintiff].

WANDT v. HEARST'S CHICAGO AMERICAN.

(Supreme Court of Wisconsin, 1906. 129 Wis. 419, 109 N. W. 70, 6 L. R. A. [N. S.] 919, 116 Am. St. Rep. 959, 9 Ann. Cas. 864.)

Action for libel. A statement was published to the effect that one Evelyn Daly, after several attempts had finally succeeded in committing suicide and *by mistake there was inserted* a photograph of the *plaintiff*. A general demurrer to the complaint was overruled and the defendant appeals [i. e., the ruling was in favor of the plaintiff].⁴⁹

⁴⁹ The statement of facts is rewritten.

WINSLOW, J. It is elementary that written or printed publications which falsely tend to bring the plaintiff into public disgrace, contempt, or ridicule are libelous. *Bradley v. Cramer*, 59 Wis. 309, 18 N. W. 268, 48 Am. Rep. 511. It is also elementary that a libel need not be in printed language, but that a caricature, or picture, or effigy, with or without printed language, which is understood to refer to the plaintiff, and which has the tendency to bring disgrace, contempt, or ridicule upon the plaintiff, is libelous. *Newell on Slander and Libel* (2d Ed.) p. 43, c. 4, § 1. A printed statement to the effect that a person is a suicide fiend, has attempted suicide 25 times, and would usually go to the hospital and ask to be pumped out, certainly has a tendency to bring that person into public contempt and ridicule. Had the article in question given no name, but simply stated that the person whose picture was given had done these things, there would be little doubt in the mind of any one that it would have been libelous, provided the picture was accurate enough to be recognized as the plaintiff's picture. From the allegations of the complaint it must be assumed that the picture was fairly accurate, as it is called a photograph, doubtless meaning a halftone reproduction of a photograph, which can now be made with a considerable degree of accuracy. The insertion of the picture under the headline of the article is, of course, in effect a statement that it is a picture of the person referred to in the article. Hence the article and picture together constitute a libel as matter of law, unless the fact that the article states that the suicide's name was Evelyn Daly can be held to be an antidote to the otherwise libelous effect.

This contention is strongly made by the appellant [that is, defendant], and is in fact the only contention worthy of very serious consideration. It seems quite true, as urged by the appellant [defendant], that persons who knew the plaintiff well, and knew her residence and family, would probably not be misled, but would at once conclude that the picture was inserted by mistake; but there may well be a considerable number of persons, who only know the plaintiff by sight or have merely a slight acquaintance, who would recognize the picture at once, and would conclude that the article in fact did refer to the plaintiff, concluding (if they knew the plaintiff's name at all) that such name was merely another alias. The complaint alleges that the plaintiff has been greatly damaged by the publication. There is ample room for the inference that she may well have been damaged in the estimation of the classes of people last mentioned. The fact that she may not have been damaged in the estimation of friends who knew her well would only affect the extent of injury and mitigate the damages. A

very similar case where a like result was reached will be found in *De Sando v. New York Herald Co.* (Sup.) 85 N. Y. Supp. 111.

By THE COURT—Order [for plaintiff] affirmed.

C. REPETITION OF ANOTHER'S STATEMENT

Points Involved.—1. The A. newspaper publishes a libelous article, which it has clipped from the B. newspaper, and names B. as the author of it; or similarly, the reporter for A., in writing up a defamatory article, states that "it is said," or "it is rumored," thus and so about X. If the defamed person sues the A. newspaper, can it escape liability on the ground that neither it nor its reporter originated the story?

2. A news stand or a newsboy sells a paper which contains a libel on X. May X. maintain an action against the vendor of the paper?

1. Repetition No Defense.—Except in the case of privileged reports, which will be discussed in a later section, it is no defense to the defendant that he was not the originator of the defamatory story. In the eyes of the law he stands in no better position than the person who started the tale. Any one who repeats such a story assumes full legal responsibility for the truth of it. Contrary, therefore, to the popular notion, there is no legal advantage in the use of the expression, "It is reported," or "It is alleged."

The rule is not changed by stating definitely the source of the information. It has even been held that one is liable, who, when he repeats the statement, disclaims his belief in the truth of it.⁵⁰ The law is tersely summed up in the phrase, "Talebearers are as bad as tale-makers."

2. Distributor of Libelous Publication Liable, When.—A librarian, newsdealer, or newsboy is not responsible for the dissemination of a libelous book or paper, unless he knew, or ought to have known, i. e., was negligent in not

⁵⁰ *Brewer v. Chase*, 121 Mich. 526, 80 N. W. 575, 46 L. R. A. 397, 80 Am. St. Rep. 527 (1899).

knowing, that it contained defamatory matter. Conversely, if he knowingly or negligently hands it on, his liability is just as great as if he had originated and published it.

MCPHERSON v. DANIELS.

(Court of King's Bench, 1829. 10 Barn. & C. 263.)

Action for slander. The declaration stated that the defendant had publicly accused the plaintiff, who was a tradesman, of being insolvent. The defendant pleaded that, at the time he uttered the words in question, he declared that he had been told the same by one T. W. Woor. The plaintiff entered a general demurrer to this plea.

BAYLEY, J.⁵¹ It seems to me that the plea is bad. * * * Upon the great point, viz. whether it is a good defence to an action for slander, for a defendant to shew he heard it from another, and at the time named the author, I am of opinion that it is not. * * * By repeating slander, a person, although he state at the time that he heard it from another, gives it a degree of credit; for the repetition of it imports a degree of belief in the truth of the slander. If I hear another say that A. is a thief, and that B., though a person of bad character, told him so, I am induced to think that the person who repeats it gives some credit to the statement. * * *

LITLEDALE, J. For the reasons already given by my Brother BAYLEY, I think that the plea is bad. * * * As great an injury may accrue from the wrongful repetition as from the first publication of slander; the first utterer may have been a person insane, or of bad character. The person who repeats it gives greater weight to the slander. A party is not the less entitled to recover damages in a court of law, for injurious matter published concerning him, because another person previously published it. That shews not that the plaintiff has been guilty of any misconduct which renders it unfit that he should recover damages in a court of law, but that he has been wronged by another person as well as the defendant, and may, consequently, if the slander was not published by the first utterer on a lawful occasion, have an action for damages against that person as well as the defendant. It seems to me, therefore, that such a plea is not an answer to an action for slander, because it does not negative the charge of malice, nor does it shew that the plaintiff is not entitled to recover damages.

⁵¹ The statement of facts is rewritten and parts of the opinions of Bayley, Littledale, and Parke, JJ., are omitted.

PARKE, J. * * * A man's reputation is entitled to the protection of the law, against those slanders which it considers to be injurious; and as every one who publishes such a slander injures that reputation, he is guilty of a wrongful act, and upon principle is liable in a civil action for any damage arising to another by reason of that wrongful act. I agree with what is said by Lord Chief Justice Best in *De Crespigny v. Wellesley*, 5 Bingh. 404: "Because one man does an unlawful act to any person another is not to be permitted to do a similar act to the same person. Wrong is not to be justified, or even excused, by wrong." A man does a wrong by, and is therefore liable to an action for, every repetition of slander; and if that be so, is the repeating of the slander less a wrong because the person who repeats it is not the same who first uttered it? There may be a great difference in the degree of injury committed, arising from the character or condition of the party who utters the slander, or the number of persons in whose presence it is uttered. The person who first uttered the slander may be a person of no character, or may have been in a state of intoxication at the time when he uttered it. Slander uttered by such a person, or under such circumstances, would not receive much attention; but if a person of good character, and in a sound state of mind, were afterwards to repeat that slander, he would thereby not only circulate it more widely, but he would give credit to it by the mere repetition of it, although he stated at the time that he heard it from another. Every wrong to property is the subject of a civil action. Upon what principle can it then be said that a wrong done to the good name and reputation of another is not equally so? It is clear that a wrong to property cannot be justified by alleging that another person has before committed a similar wrong. In this case, too, the plaintiff alleges that, in consequence of the words spoken by the defendant, he sustained a special damage, by the loss of a customer, and non constat, that any such special damage would have arisen from the words originally spoken, if they had not been repeated by the defendant. It is therefore clear that the plea is bad, and the judgment of the court must be for the plaintiff.

Judgment for plaintiff.⁵²

⁵² Accord, *De Crespigny v. Wellesley*, 5 Bing. 392 (1829): "It is a principle of our law that whoever willfully assists in the doing of an unlawful act becomes answerable for all the consequences of such act; what reason is there to except the circulation of slander out of this rule? He who prints and publishes what was given to him in manuscript has to answer for by far the greatest part of the mischief that the statement has occasioned." See, also, *Bishop v. Journal Newspaper Co.*, 168 Mass. 327, 47 N. E. 119 (1897), holding

HOTCHKISS v. OLIPHANT.

(Supreme Court of New York, 1842. 2 Hill, 510, 513.)

NELSON, C. J.⁵³ * * * It is made a point in this case, and was insisted upon in argument, that the editor of a public newspaper is at liberty to copy an item of news from another paper, giving at the same time his authority, without subjecting himself to legal responsibility, however libelous the article may be, unless express malice be shown. It was conceded that the law did not, and ought not, to extend a similar indulgence to any other class of citizens; but the counsel said that a distinction should be made in favor of editors, on the ground of the peculiarity of their occupation; that their business was to disseminate useful knowledge among the people, to publish such matters relating to the current events of the day happening at home or abroad as fell within the sphere of their observation, and as the public curiosity or taste demanded; and that it was impracticable for them at all times to ascertain the truth or falsehood of the various statements contained in other journals. We were also told that, if the law were not thus indulgent, some legislative relief might become necessary for the protection of this class of citizens. *Undoubtedly, if it be desirable to pamper a depraved public appetite or taste, if there be any such, by the republication of all the falsehoods and calumnies upon private character that may find their way into the press—to give encouragement to the widest possible circulation of these vile and defamatory publications by protecting the retailers of them—some legislative interference will be necessary, for no countenance can be found for the irresponsibility claimed in the common law. That reprobates the libeler, whether author or publisher, and subjects him to both civil and criminal responsibility. His offense is there ranked with that of the receiver of stolen goods, the perjurer and suborner of perjury, the disturber of the public peace, the conspirator, and other offenders of like character.* * * * The act of publication is an adoption of the original calumny, which must be defended in the same way as if invented by the defendant. The republication assumes and indorses the truth of the charge, and when called on by the aggrieved party, the publisher should be held strictly to the proof. If he chooses to become the indorser and retailer of private scandal, without taking the trouble of inquiring into the truth of what he publishes, there

that one is liable even though, repeating the statement, he disclaims his belief in the truth of it. *Brewer v. Chase*, 121 Mich. 526, 80 N. W. 575, 46 L. R. A. 397, 80 Am. St. Rep. 527 (1899).

⁵³ The statement of facts and part of the opinion are omitted.

is no ground for complaint, if the law, which is as studious to protect the character as the property of the citizen, holds him to this responsibility. The rule is not only just and wise in itself, but, if steadily and inflexibly adhered to and applied by courts and juries, will greatly tend to the promotion of truth, good morals, and common decency on the part of the press, by inculcating caution and inquiry into the truth of charges against private character before they are published and circulated throughout the community. * * *

New trial denied.⁵⁴

VIZETELLY v. MUDIE'S SELECT LIBRARY, Limited.

(Court of Appeal. [1900] 2 Q. B. 170.)

Application for judgment or a new trial in an action tried before Grantham, J., with a jury.

The action was for a libel contained in a book, copies of which had been circulated and sold by the defendants, who were the proprietors of a circulating library with a very ex-

⁵⁴ Commenting on the above case, Cooley, *Constitutional Limitations* (7th Ed.) p. 643, says: "If this strong condemnatory language were confined to the cases where private character is dragged before the public for detraction and abuse, to pander to a depraved appetite for scandal, its propriety and justice and the force of its reasons would be at once conceded. But a very large proportion of what the newspapers spread before the public relates to matters of public concern, in which, nevertheless, individuals figure, and must therefore be mentioned in any account or discussion. To a great extent, also, the information comes from abroad; the publisher can have no knowledge concerning it, and no inquiries which he could make would be likely to give him more definite information, unless he delays the publication until it ceases to be of value to his readers. Whatever view the law may take, public sentiment does not brand the publisher of a newspaper as libeler, conspirator, or villain, because the telegraph dispatches transmitted to him from all parts of the world, without any knowledge on his part concerning the facts, are published in his paper, in reliance upon the prudence, care, and honesty of those who have charge of the lines of communication, and whose interest it is to be vigilant and truthful. The public demand and expect accounts of every important meeting, of every important trial, and of all the events which have a bearing upon trade and business, or upon political affairs. It is impossible that these shall be given in all cases without matters being mentioned derogatory to individuals; and if the question were a new one in the law, it might be worthy of inquiry whether some line of distinction could not be drawn which would protect the publisher, when giving in good faith such items of news as would be proper, if true, to spread before the public, and which he gives in the regular course of his employment, in pursuance of a public demand, and without any negligence, as they come to him from the usual and legitimate sources, which he has reason to rely upon, at the same time leaving him liable when he makes his columns the vehicle of private gossip, detraction, and malice."

tensive business. The defendants in their defense stated that, if they sold or lent the book in question, they did so without negligence, and in the ordinary course of their business as a large circulating library; that they did not know, nor ought they to have known, that it contained the libel complained of; that they did not know, and had no ground for supposing that it was likely to contain libelous matter; and that under the circumstances so stated they contended that they did not publish the libel.

The plaintiff had been employed by Mr. Gordon Bennett, of the New York Herald, to proceed as the head of an expedition to Africa to search for Sir H. Stanley, who was then engaged in an expedition for the rescue of Emin Pasha, and to furnish news to the New York Herald on the subject. He met Stanley and Emin Pasha in Africa on their way down to the coast at a place called Masura, and subsequently sent off letters to Mr. Gordon Bennett. Messrs. Archibald Constable & Co., a well-known firm of publishers, in October, 1898, published in this country a book called "Emin Pasha: His Life and Work," which was a slightly abridged English version of a work published in Germany that purported to be compiled from the journals, letters, and scientific notes of Emin Pasha and from official documents. It contained the following passage purporting to be an extract from Emin Pasha's diary: "Vizetelly sent off three messengers to-day to the coast, each with a bulky letter. However, as he is not yet sober, he cannot surely have written them himself, and the solution of the problem is, as Dr. Parke tells us, simply that Stanley had the correspondence ready, and knocked it down to the highest bidder, Vizetelly—that is, Gordon Bennett—and quite right, too." This was the libel complained of. It was not suggested that the statements contained in it were true.

The plaintiff on becoming aware of the libel brought an action for libel against Messrs. Constable & Co., which was settled by their paying £100 damages, apologizing, and undertaking to withdraw the libel from circulation. In the issue of the Publishers' Circular, a recognized medium for trade advertisements of the kind, for November 12, 1898, a notice was inserted to the effect that Messrs. Archibald Constable & Co. requested that all copies of volume I of "The Life and Work of Emin Pasha" might be returned to them immediately, as they wished to cancel a page, and insert another one in its place, and stating that they would of course defray the carriage both ways, if desired. A similar notice was inserted on the same date in the Athenæum newspaper, a well-known medium of communication among literary peo-

ple. In March, 1899, it came to the plaintiff's knowledge that the defendants were lending copies of the work as originally published to subscribers, and also selling surplus copies of the same, and he thereupon commenced the action against them. It appeared that none of those engaged in the conduct of the defendants' business had seen the before-mentioned notices in the Publishers' Circular and Athenæum, though the defendants took in those papers.

Mr. A. O. Mudie, one of the defendants' two managing directors, who was called as a witness for the defendants, gave evidence to the effect that the defendants did not know when they circulated and sold the book in question that it contained the passage complained of. He stated that the books which they circulated were so numerous that it was impossible in the ordinary course of business to have them all read, and that they were guided in their selection of books by the reputation of the publishers, and the demand for the books. He said in cross-examination that there was no one else in the establishment besides himself and his codirector who exercised any kind of supervision over the books; that they did not keep a reader or anything of that sort; that they had had books on one or two occasions which contained libels; that that would occur from time to time; that they had had no action brought against them for libel before the present action; and that it was cheaper for them to run an occasional risk of an action than to have a reader.

The learned judge, in summing up, in substance directed the jury to consider whether, having regard to the above-mentioned evidence, the defendants had used due care in the management of their business. The jury found a verdict for the plaintiff, damages £100.

The defendants applied for judgment or a new trial on the ground that there was no evidence on which a verdict could be found or judgment entered for the plaintiff, and also on the grounds that the judge insufficiently directed the jury on the question what amounted in law to the publication of a libel, and on the question of the burden of proof as to publication and of the duty of the defendants and their alleged negligence, and that the verdict was against the weight of the evidence.

ROMER, L. J. The law of libel is in some respects a very hard one. In the remarks which I am about to make I propose to deal only with communications which are not privileged. For many years it has been well-settled law that a man who publishes a libel is liable to an action, although he is really innocent in the matter, and guilty of no negligence. That rule has been so long established as to be incapable of

being altered or modified, and the courts, in endeavoring to mitigate the hardship resulting from it in many cases, have only been able to do so by holding that, under the circumstances of cases before them, there had been no publication of the libel by the defendant. The result, in my opinion, has been that the decisions on the subject have not been altogether logical or satisfactory on principle. The decisions in some of the earlier cases with which the courts had to deal are easy to understand. Those were cases in which mere carriers of documents containing libels, who had nothing to do with and were ignorant of the contents of what they carried, have been held not to have published libels.

Then we have the case of *Emmens v. Pottle*, 16 Q. B. D. 354, in which vendors of newspapers in the ordinary course of their business sold a newspaper which contained a libel. It was clear that selling a document which contained a libel was *prima facie* a publication of it, but the court there held that there was no publication of the libel under the circumstances which appeared from the special findings of the jury, those findings being (1) that the defendants did not know that the newspapers at the time they sold them contained libels on the plaintiff; (2) that it was not by negligence on the defendants' part that they did not know that there was any libel in the newspapers; and (3) that the defendants did not know that the newspaper was of such a character that it was likely to contain libelous matter, nor ought they to have known so. Lord Esher, M. R., in this court was of opinion that, though the vendors of the newspapers, when they sold them, were *prima facie* publishers of the libel, yet, when the special findings of the jury were looked at, the result was that there was no publication of the libel by the defendants. Bowen, L. J., put his judgment on the ground that the vendors of the newspapers in that case were really only in the same position as an ordinary carrier of a work containing a libel. The decision in that case, in my opinion, worked substantial justice; but, speaking for myself, I cannot say that the way in which that result was arrived at appears to me altogether satisfactory; I do not think that the judgments very clearly indicate on what principle Courts ought to act in dealing with similar cases in future.

That case was followed by other cases, more or less similar to it, namely, *Ridgway v. Smith & Son* [1890] 6 Times L. R. 275, *Mallon v. W. H. Smith & Son*, 9 Times, L. R. 621, and *Martin v. Trustees of the British Museum* [1894] 10 Times L. R. 338.

The result of the cases is, I think, that, as regards a person who is not the printer or the first or main publisher of a

work which contains a libel, but has only taken what I may call a subordinate part in disseminating it, in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and, if he succeeds in shewing (1) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (2) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (3) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was *prima facie* publication of it, he may nevertheless, on proof of the before-mentioned facts, be held not to have published it. But the onus of proving such facts lies on him, and the question of publication or nonpublication is in such a case one for the jury.

Applying this view of the law to the present case, it appears to me that the jury, looking at all the circumstances of the case, have in effect found that the defendants published the libel complained of, and therefore the defendants are liable, unless that verdict is disturbed. Looking at the special circumstances of the case, which were brought to the attention of the jury, I cannot say that they could not reasonably find as they did. The only remaining question is whether the summing up and direction of the learned judge were such as would justify us in sending down the case for a new trial. I find no misdirection in point of law, and though, with great respect to the learned judge, I do not think that all he said was correct, or justified by the evidence, the jury had the facts fully put before them, and on the whole I do not think that there was anything in the summing up which caused the jury to come to an erroneous conclusion, or which would justify us in granting a new trial. For these reasons I think the application must be dismissed [and the judgment for the plaintiff affirmed].

Application dismissed.⁵⁵

⁵⁵ Opinions by A. L. Smith and Vaughan-Williams, L. J. J. omitted.

D. CONDITIONAL PRIVILEGE

(1) *Privileged Reports*

Points Involved.—1. (a) Senator X., in the course of debate in the United States Senate, falsely states that A., the president of a certain corporation, has been violating the Sherman Act and is a scoundrel of the deepest dye. The B. newspaper publishes this debate in full.

(b) In the course of a trial, witness C. falsely states that witness D. has perjured himself. The B. newspaper includes this in its report of the trial.

It being admitted that the defamatory accusations were false, can B. avail itself of any defense, if sued by A. in (a), or D. in (b)?

2. Would it make any difference if the newspaper (1) inserted these items solely because of its personal ill will for the defamed person; or (2) added to the report the statement that the persons guilty of such conduct should be prosecuted without delay; or (3) picked out and published these defamatory statements alone, omitting everything else; or (4) in the course of the debate, in which some things favorable and other things unfavorable to the defamed person are said, published only the condemnatory utterances?

In other words, after it is decided that the occasion is one which renders the report of it conditionally privileged, what are the *conditions* which must be fulfilled to make out the defense? For example, is the motive of the paper material? Does the right to report include the right to comment? Does it make any difference if the report is partial or garbled? In order to be considered a fair report, must it be verbatim?

3. When it is said that the report of a judicial proceeding is privileged, what is meant by "judicial proceeding"? For example: Does the report of what is contained in a bill in equity for divorce, as soon as it is filed in the office of the clerk, come within the privilege, or must the paper await

some later stage in the litigation? Is the report of an arrest privileged before there has been a preliminary examination? Would it make any difference whether the arrest was with or without warrant? Do reports of grand jury returns come within the privilege? Is it allowable to publish what police and other officials or attorneys say about the case in private interview, where the matter is defamatory?

4. What of the publication of that which is said in public meetings, political and otherwise, public lectures, and the like, if defamatory statements are made?

1. **The Character of the Defense.**—In considering the defense of privilege, let it be assumed that the defendant has published a defamatory statement which is untrue. It does not follow from this alone that he need answer in damages. If the occasion was a privileged one, he may still be granted complete immunity.

Privilege is of two kinds, absolute and conditional. Certain occasions are held to be absolutely privileged. For example, a judge, in the conduct of a case, enjoys complete and unconditional immunity for all defamatory utterances. Falsehood and bad faith are legally immaterial. Members of state Legislatures, of Congress, and of Parliament are granted like immunity while in the discharge of their duties. The privilege being absolute, no inquiry can be made into the falsity of the statement or the motive of the speaker. Substantially the same protection is given to parties, counsel, and witnesses in legal proceedings.

It is considered sound public policy to send such individuals, upon such occasions, to their tasks unhampered by any lurking fear that they may later be called to account for what they say.

The key to conditional privilege is found in the word "conditional." One who has spoken upon a conditionally privileged occasion is not granted immunity, unless he acted in absolute good faith and solely with a view to furthering the ends sought to be conserved by the law in declaring the occasion privileged. The journalist is concerned primarily only with the law of conditional privilege.

2. Reports of Legislative, Judicial, and other Public Proceedings.—Ordinarily one is personally responsible for any defamatory utterance that he repeats. This rule was worked out in the previous section.

The repetition of what is said in a legislative or judicial proceeding constitutes a well-recognized exception to this general rule. Reports of such proceedings are said to be conditionally privileged.

The rule as it was developed at common law is very well epitomized in an Idaho statute, as follows: "No reporter, editor, or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument or debate in the course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication."⁵⁶ It will be noted that this statute refers only to criminal libel, but the general principles here enunciated are equally applicable to civil libel.

The privilege attaches, not only to the proceedings of governing and legislative bodies themselves, such as city councils, state Legislatures and the Congress of the United States, but also to the public hearings of committees appointed by these bodies.⁵⁷

3. Why Such Reports are Privileged.—It may be said very positively at the outset that reports of judicial or legislative proceedings are not privileged, because the public may be interested in the subject-matter of the particular report. Using the court proceeding as an illustration, it is not because the public feels any interest in or curiosity about the case of *Jones v. Smith*, or charges of immorality

⁵⁶ Rev. St. Idaho 1908, § 6743.

⁵⁷ *Meteye v. Times-Democrat Publishing Co.*, 47 La. Ann. 824, 17 South. 314 (publication of proceedings of a committee of the city council); *Terry v. Fellows*, 21 La. Ann. 375 (report of statements made before an investigating committee of Congress). But it was held in *Belo & Co. v. Wren*, 63 Tex. 686, that the publication of the report of a committee appointed by the state Legislature to sit after adjournment to investigate alleged land frauds and to report to the Attorney General was not privileged, on the ground that the committee was not discharging regular legislative duties, and that its meetings were secret.

or other misconduct that may have been made by one against the other in the course of the trial. The privilege arises rather from the fact, as Mr. Justice Holmes has so well said, that "it is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."⁵⁸

4. **Public Meetings.**—Reports of what transpires at various meetings, other than court and legislative and similar public official proceedings, even though the meetings are thrown open to the public, are not privileged, unless rendered so by statute. Very few jurisdictions have thus extended the privilege.⁵⁹

⁵⁸ *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318, *infra*, p. 108.

⁵⁹ In England, by statute, the law of privileged reports has been extended to include reports of matters of public concern occurring at any lawful public gathering. The Law of Libel Amendment Act, 1888 (51 & 53 Vict. c. 64, § 4), provides: "A fair and accurate report published in any newspaper of the proceedings of a public meeting or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any act of Parliament, warrant under the royal sign manual, or other lawful warrant or authority, select committees of either house of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any government office or department, officer of state, commissioner of police or chief constable, of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously: Provided, that nothing in this section shall authorize the publication of any blasphemous or indecent matter: Provided, also that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same. For the purposes of this section, 'public meeting' shall mean any meeting bona fide and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted."

California provides by statute (Civil Code, § 47, subd. 5, that a publication is privileged if it is "a fair and true report, without malice

As in other ordinary cases of repetition the newspaper therefore assumes full responsibility for the truth of all defamatory statements reported, which were uttered at such meetings.

5. Quasi Official Proceedings.—Without the aid of statute, the rule as stated in the foregoing section has been relaxed sufficiently by a few courts to include situations that lie between regular public official proceedings on one hand and matters of purely private concern on the other hand.

For example, the Massachusetts court, in *Barrows v. Bell*,⁶⁰ held that the report of the proceedings of the Massachusetts Medical Society in the expulsion of one of its members was privileged. It was pointed out by the court that the charter of the society invested it with large powers and privileges, in regulating the important public interest of the practice of medicine and surgery, and that expulsion proceedings were therefore quasi judicial.

A case going somewhat beyond this is found in Louisiana.⁶¹ Plaintiff, a bookmaker, had been ruled off the turf for alleged fraudulent practices. The action was pursuant to the rules of the association. The proceedings were published in the defendant's paper. In holding the report privileged, the court said: "The matter of fraudulent racing is one which concerns the public, in which the proprietors of race tracks, for the protection of their patrons and themselves, are in duty bound to keep the public posted as to their action in any given case." It was also held in Missouri⁶² that the report of an interview with Attorney General Hadley, in which he declared the conduct of a certain race course to be illegal and the managers guilty of a felony, and further that he and his assistants were taking steps to see that the practices were stopped and the parties prosecuted, was privileged. The court said: "One of our own courts has extended this privilege to the acts, and the rea-

of the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or the matter complained of was for the public benefit."

⁶⁰ 7 Gray, 301, 66 Am. Dec. 479.

⁶¹ *Rabb v. Trevelyan*, 122 La. 174, 47 South. 455.

⁶² *Tilles v. Pulitzer Pub. Co.*, 241 Mo. 609, 145 S. W. 1143.

sons for the acts, of important public officials." It is believed that both the Louisiana case and the Missouri case are unsafe to follow as general guides.

6. The Conditions That are Attached to Reports of Legislative and Judicial Proceedings.—They are:

(1) The report must be a fair and accurate, not a garbled, account of what transpired. It need not be verbatim, but it must not be one-sided. A good test is: Does the report place the reader in substantially as good a position, so far as the defamatory matter is concerned, as he would have been if he had personally heard the proceedings?

(2) It must have been made with good motives; i. e., purely for the purpose of publishing the news as news, and not because of personal malice.

(3) It must be simply an account of what transpired, as distinguished from comment thereon and inferences drawn therefrom.

At this point headlines must be carefully guarded. They often prove a pitfall to the unwary. One arrested on a charge of murder is not yet officially a murderer. The headline, therefore, should not read, "Murderer Arrested."⁶³

As will be pointed out more fully later on, comment on pending cases constitutes contempt of court in addition to depriving the defendant of his defense of privilege.⁶⁴

(4) The report shall only contain what is revealed in the proceedings. The privilege does not attach to data gathered from personal interviews with the parties to the action, the attorneys, the witnesses, nor even to the court or police officials.⁶⁵

⁶³ *Hayes v. Press Co., Limited*, 127 Pa. 642, 18 Atl. 331, 5 L. R. A. 643, 14 Am. St. Rep. 874 (news item reciting that a judgment for \$15,000 had been entered against J. F. and W. N. Hayes, was given the caption, "Hotel Proprietors Embarrassed"; the use of the word "embarrassed" was held to have carried the item beyond the pale of a privileged report, since it imputed a state of impaired credit to the Hayeses); *Gustin v. Evening Press Co.*, 172 Mich. 311, 137 N. W. 674, Ann. Cas. 1914D, 95.

⁶⁴ See Contempt, chapter IV, *infra*.

⁶⁵ See *Gilman v. McClatchy*, *infra*, p. 128, and footnote thereto, p. 129.

7. **What are Court Proceedings?**—The privilege does not, except in a few states, attach to the report of legal proceedings, until the stage is reached *where the judge is brought into the case*. Therefore no privilege at all attaches to the report of the contents of a complaint, or declaration, or bill in equity, when it is first filed. If its contents are defamatory, the paper gives publicity to them at its peril as to their truth or falsity. But when the judge has been drawn into the proceeding, as, for example, where he grants, even *ex parte*, i. e., in his private office, a preliminary restraining order, or hears an argument on a demurrer or motion in open court, or in a criminal case, has issued a warrant of arrest, a public report of all that has transpired in the case is conditionally privileged.

8. **Grand Jury Returns.**—A report of the return of the grand jury, after it is released, is privileged. A report that one had been indicted, published before the accused had been apprehended, would obviously be improper.

9. **Publication Prohibited.**—The publication of a part or all the proceedings in a given case may be prohibited by order of court. A violation of such an order constitutes contempt of court.

10. **Obscenity and Blasphemy.**—The common law renders illegal the publication of obscene or blasphemous happenings and utterances, notwithstanding they may have been part of a court proceeding.

(A) THE GENERAL PRINCIPLE UNDERLYING CONDITIONAL PRIVILEGE

WASON v. WALTER.

(Court of Queen's Bench, 1868. L. R. 4 Q. B. 73.)

COCKBURN, C. J.⁶⁶ This case was argued a few days since before my Brothers LUSH, HANNEN, and HAYES, and myself, and we took time, not to consider what our judgment should be, for as to that our minds were made up at the close of the argument, but because, owing to the importance and novelty

⁶⁶ The statement of facts and part of the opinion are omitted.

of the point involved, we thought it desirable that our judgment should be reduced to writing before it was delivered.

The main question for our decision is, whether a faithful report in a public newspaper of a debate in either house of Parliament, containing matter disparaging to the character of an individual, as having been spoken in the course of the debate, is actionable at the suit of the party whose character has thus been called in question. We are of opinion that it is not.

Important as the question is, it comes now for the first time before a court of law for decision. Numerous as are the instances in which the conduct and character of individuals have been called in question in Parliament during the many years that parliamentary debates have been reported in the public journals, this is the first instance in which an action of libel founded on a report of a parliamentary debate has come before a court of law. There is, therefore, a total absence of direct authority to guide us. There are, indeed, dicta of learned judges having reference to the point in question, but they are conflicting and inconclusive, and, having been unnecessary to the decision of the cases in which they were pronounced, may be said to be extrajudicial. [The court here reviews certain cases.]

Decided cases thus leaving us without authority on which to proceed in the present instance, we must have recourse to principle in order to arrive at a solution of the question before us, and fortunately we have not far to seek before we find principles in our opinion applicable to the case, and which will afford a safe and sure foundation for our judgment.

It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible. * * *

The broader principle on which this exception to the general law of libel is founded is that the advantage to the community from publicity being given to the proceedings of courts of justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that, with a view to distinguish the publication of proceedings in Parliament from that of proceedings of courts of justice, it has been said that the immunity accorded to the reports of proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of Parliament are not; as also that by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true ground is that given by Lawrence, J., in *Rex v.*

Wright, 8 T. R. at page 298, viz. that "though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings." In *Davison v. Duncan*, 7 E. & B. at page 231, 26 L. J. Q. B. at page 106, Lord Campbell says: "A fair account of what takes place in court is privileged. The reason is, that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity." And Wightman, J., says: "The only foundation for the exception is the superior benefit of the publicity of judicial proceedings which counterbalances the injury to individuals, though that at times may be great."

Both the principles, on which the exemption from legal consequences is thus extended to the publication of the proceedings of courts of justice, appear to us to be applicable to the case before us. The presumption of malice is negatived in the one case as in the other by the fact that the publication has in view the instruction and advantage of the public, and has no particular reference to the party concerned. There is also in the one case as in the other a preponderance of general good over partial and occasional evil. We entirely concur with Lawrence, J., in *Rex v. Wright*, 8 T. R. at page 298, that the same reasons which apply to the reports of the proceedings in courts of justice apply also to proceedings in Parliament. It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of Parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done the welfare of the community depends. Where would be our confidence in the government of the country or in the Legislature by which our laws are framed, and to whose charge the great interests of the country are committed, where would be our attachment to the constitution under which we live, if the proceedings of the great council of the realm were shrouded in secrecy and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constitu-

encies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in Parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house? Can any man bring himself to doubt that the publicity given in modern times to what passes in Parliament is essential to the maintenance of the relations subsisting between the government, the Legislature, and the country at large? It may, no doubt, be said that, while it may be necessary as a matter of national interest that the proceedings of Parliament should in general be made public, yet that debates in which the character of individuals is brought into question ought to be suppressed. But to this, in addition to the difficulty in which parties publishing parliamentary reports would be placed, if this distinction were to be enforced and every debate had to be critically scanned to see whether it contained defamatory matter, it may be further answered that there is perhaps no subject in which the public have a deeper interest than in all that relates to the conduct of public servants of the state, no subject of parliamentary discussion which more requires to be made known than an inquiry relating to it. Of this no better illustration could possibly be given than is afforded by the case before us. A distinguished counsel, whose qualification for the judicial bench had been abundantly tested by a long career of forensic eminence, is promoted to a high judicial office, and the profession and the public are satisfied that in a most important post the services of a most competent and valuable public servant have been secured. An individual comes forward and calls upon the House of Lords to take measures for removing the judge, in all other respects so well qualified for his office, by reason that on an important occasion he had exhibited so total a disregard of truth as to render him unfit to fill an office for which a sense of the solemn obligations of truth and honor is an essential qualification. Can it be said that such a subject is not one in which the public has a deep interest, and as to which it ought not to be informed of what passes in debate? Lastly, what greater anomaly or more flagrant injustice could present itself than that, while from a sense of the importance of giving publicity to their proceedings, the houses of Parliament not only sanction the reporting of their debates, but also take measures for giving facility to those who report them, while every member of the educated portion of the community from the highest to the lowest looks with eager interest to the debates of either house, and considers it a part of the duty of the public journals to furnish an account of what passes there, we were to hold that a party publishing a parliamentary debate is to be held liable

to legal proceedings because the conduct of a particular individual may happen to be called in question? * * *

To us it seems clear that the principles on which the publication of reports of the proceedings of courts of justice have been held to be privileged apply to the reports of parliamentary proceedings. The analogy between the two cases is in every respect complete. If the rule has never been applied to the reports of parliamentary proceedings till now, we must assume that it is only because the occasion has never before arisen. If the principles which are the foundation of the privilege in the one case are applicable to the other, we must not hesitate to apply them, more especially when by so doing we avoid the glaring anomaly and injustice to which we have before adverted. Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of Parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties? Again, the recognition of the right to publish the proceedings of courts of justice has been of modern growth. Till a comparatively recent time the sanction of the judges was thought necessary even for the publication of the decisions of the courts upon points of law. Even in quite recent days judges, in holding publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what are called *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this court, as, for instance, on applications for criminal informations, are published every day, but

such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of, and, if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is, not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected.

It is to be observed that the analogy between the case of reports of proceedings of courts of justice and those of proceedings in Parliament being complete, all the limitations placed on the one to prevent injustice to individuals will necessarily attach on the other; a garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection. Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose or with the effect of injuring an individual will be unlawful, as was held in the cases of *Rex v. Lord Abingdon*, 1 Esp. 226, and *Rex v. Creevey*, 1 M. & S. 273. At the same time it may be as well to observe that we are disposed to agree with what was said in *Davison v. Duncan*, 7 E. & B. at page 233, 26 L. J. Q. B. at page 107, as to such a speech being privileged if bona fide published by a member for the information of his constituents. But whatever would deprive a report of the proceedings in a court of justice of immunity will equally apply to a report of proceedings in Parliament. * * *

For the present purpose, we must treat such publication as in every respect lawful, and hold that, while honestly and faithfully carried on, those who publish them will be free from legal responsibility though the character of individuals may incidentally be injuriously affected. * * * Rule discharged.⁶⁷

⁶⁷ "Rule discharged" means judgment for the defendant. The rule of this case has met with general acceptance without the aid of a statute. But in a number of states it has crystallized into a statutory enactment. See *Rev. St. Idaho 1908*, § 6743: "No reporter, editor or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument or debate in the course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication."

Similar statutes have been enacted in the following states: *Arizona*, *Rev. St. 1913*, §§ 227 and 228; *California*, *Civ. Code*, § 47, subd. 4, and *Pen. Code*, §§ 254 and 255; *Georgia*, *Park's Ann. Code*, 1914, § 4432, and section 4436, subd. 4; *Minnesota*, *Gen. St. 1913*, § 8649 (the Minnesota statute contains the following proviso clause, which is characteristic of the statutes on this subject: "But the foregoing shall not apply to a libel contained in the heading of the report, or in any matter added by another person concerned in the publication,

(B) PUBLICATION WITH GOOD MOTIVES, ONE OF THE CONDITIONS

STEVENS v. SAMPSON.

(Court of Appeal, 1879. 5 Exch. Div. 53.)

Claim for falsely and maliciously printing and publishing of the plaintiff certain words in certain newspapers. The libel set out in the claim was a report, published by the defendant, of certain proceedings in a plaint of Nettlefold v. Fulcher, tried at the Marylebone county court. One defense was that the words alleged to have been published were a true and correct account and report of a certain trial in a court of justice. At the trial before Cockburn, C. J., at the Hilary Sittings, 1879, at Westminster, it was proved that the defendant, who was a solicitor, had sent the report set out in the claim of the trial of Nettlefold v. Fulcher, before the judge of the Marylebone county court, to the local newspapers. Cockburn, C. J., left two questions to the jury: 1. Was the report a fair one? 2. Was it sent honestly, or with a desire to injure the plaintiff? The jury answered these questions: 1. That it was in substance a fair report. 2. That it was sent with a certain amount of malice; and found a verdict for the plaintiff with 40s. damages. Cockburn, C. J., directed judgment to be entered for the plaintiff for that amount.

The defendant appealed on the ground that the judgment entered upon the findings of the jury was wrong, and that it should have been directed to be entered for the defendant, the jury having found that an alleged libel, being a report in certain newspapers of proceedings which took place in a court of justice, was a fair report of the proceedings.

or in the report of anything said or done at the time and place of the public and official proceeding, which was not a part thereof"); *Montana*, Rev. Codes 1907, § 3604; *New York*, Penal Law (Consol. Laws, c. 40) § 1345; *North Dakota*, Comp. Laws 1913, §§ 4354, 9556, and 9557; *Ohio*, Page & A. Gen. Code, § 11343— (the Ohio enactment goes somewhat more into particulars, as follows: "The publication of a fair and impartial report of the proceedings before state or municipal legislative bodies, boards or officers, or the whole or a fair synopsis of any bill, ordinance, report, resolution, bulletin, notice, petition or other document presented, filed or issued in any proceedings before such legislative or executive body, board or officer, shall be privileged unless it shall be proved that such publication was made maliciously"); *Oklahoma*, Rev. Laws, §§ 2381 and 2386; *South Dakota*, Comp. Laws 1913, Civ. Code, § 31, and Cr. Code, §§ 321 and 322; *Texas*, Rev. St. 1911, art. 5597; *Utah*, Comp. Laws 1907, § 4202; *Washington*, Rem. & Bal. Codes, § 2432; *Wisconsin*, St. 1913, § 4256a.

LORD COLERIDGE, C. J.⁶⁸ The question before us is whether, on the findings of the jury, the entry of the judgment for the plaintiff is right. I am of opinion that it was rightly entered for the plaintiff. The principle which governs this case is plain. It is like that which governs most other cases of privilege. In order, in cases of libel, to establish that the communication is privileged, two elements must exist; not only must the occasion create the privilege, but the occasion must be made use of bona fide and without malice; if either of these is absent, the privilege does not attach; here the second element is absent, for bona fides is wanting, and malice exists. There are certain cases in which the privilege is absolute. Words spoken in the course of a legal proceeding by a witness or by counsel, and words used in an affidavit in the course of a legal proceeding are absolutely privileged. It is considered advantageous for the public interests that such persons should not in any way be fettered in their statements. This is the first time that a report of proceedings in a court of justice has been sought to be brought within this same class of privilege. I am not disposed to extend the bounds of privilege beyond the principles already laid down, and I find no authority for its extension. * * *

BRETT, L. J. It seems to me that the verdict of the jury means that the defendant did not send this report to be published for the benefit of the public in a matter as to which they ought to be informed, but from a desire to injure the plaintiff. Assuming the report to be a fair and correct account of the proceedings in a court of justice, was it privileged? It seems to me that, whatever privilege is relied upon in an action, the defendant is bound to prove that the occasion is privileged, and that he used the occasion in a privileged way. He is bound to show that he used the privilege bona fide and without malice; if he fails in either of these incidents, he fails to show that the communication is privileged. The defendant in order to establish his defense, must show that the report was substantially correct and that this substantially correct report was made without malice. It is said that the publication of proceedings in a court of justice is a case of absolute privilege, but there is no authority for that statement, and the case comes within the general rule. The defendant has failed to make out the defence he has put on the record. Judgment affirmed.⁶⁸

⁶⁸ The statement of facts is rewritten and the opinion by Bramwell, L. J., is omitted.

(C) REPORT DISTINGUISHED FROM COMMENT

BROWN v. PROVIDENCE TELEGRAM PUB. CO.

(Supreme Court of Rhode Island, 1903. 25 R. I. 117, 54 Atl. 1061.)

Trespass on the case for libel. Following a verdict for plaintiff, defendant petitioned for a new trial, and the petition was denied.

PER CURIAM. The defendant's petition for a new trial is denied, and judgment [for the plaintiff] will be rendered upon the decision of Mr. Justice DOUGLAS, which is approved and adopted as the opinion of the court:

Decision.

DOUGLAS, J. This is an action of libel, complaining of the publication of an article which appeared in the defendant's newspaper October 13, 1899, purporting, under displayed headings, to give an account of "Gov. Brown's Legal Troubles," with the subtitles, also displayed, "Creditor in Form of New England Butt Company After Him Red Hot for Settlement. Other Peculiar Matters Journalistic Stock Transfer to Former Governor's Son to be Probed in Action Brought."

The legal principles applicable to a case of this kind have been recently announced by this court in *Metcalf v. Times Publishing Co.*, 20 R. I. 674, 78 Am. St. Rep. 900. It may be further observed, as applicable to the present case, that, if any class of people have the right to invoke the protection of the law against malicious intermeddling with their reputations, litigants in the courts should be so guarded.

The orderly system of our social life, which excludes the private redress of wrongs, provides these tribunals, and compels the citizen to resort to them to enforce his rights or to defend against unjust claims. When he is in court, therefore, as a party or as a witness, any publication unjustly commenting upon his case or his behavior calls for severe condemnation. The conduct of the judge and jury and the decisions of the court are proper subjects of fair and temperate criticism. These are public officers performing their work in the face of public opinion, and they are responsible to the people, from whom they derive their powers, for the honest and intelligent exercise of their official functions. A newspaper, or an individual who writes for a newspaper, may argue against the conclusions of law announced by the court, or may criticise its methods of procedure with a view to promote the correction of errors or abuses, and great latitude is allowable in such articles, provided they are founded on truthful statements and proceed from good motives. It is con-

ceded that the proceedings of the courts in a general way constitute legitimate items for the newsgatherer to publish. The results of a majority of cases tried as a matter of fact concern no one but the parties to them, but incidentally propositions of law are considered which interest the community generally, and it would be contracting the right of free speech into a narrow channel to require a selection of only those cases for report which concern public questions. To a fair and true publication of his case a litigant must submit. It is only an extension of the publicity of the courtroom itself. But this principle gives neither to a newspaper nor to an individual the right to prejudge a case, or to misstate it, or to hold up to scorn or ridicule, either directly or by natural implication from his language, a party who is pursuing his legal remedies in court.

If one avails himself of the privilege, which is given for public reasons, to publish a report of court proceedings, he must make such report full, true, and fair, at his peril. Tried by these principles, the article complained of in this case is plainly libelous. It relates truthfully enough certain things that took place in court. It reproduces with substantial accuracy the tenor of the pleadings, and states the history of the litigation which terminated in the issue of an execution and the levy of it upon the plaintiff's residence. Most of the facts, categorically stated, are substantially true; and, if this were all, while the reference to cases long ago terminated might be considered a stretch of the newsgatherer's net not required by any public necessity, the article could not be seriously condemned. But every statement of fact is accompanied with comment, and inference, and insinuation directly tending to excite ridicule and depreciation of the plaintiff's character. More than this: there are direct statements which assert or clearly imply the plaintiff's inability to meet his pecuniary obligations. In one part of the article the assertion is made that "whether or not he can keep" his residence "out of the auctioneer's hands depends upon the result of a hearing which will take place to-morrow in the appellate division," and this statement might well happen to be read by persons who would not read the whole article and come upon the statement below, which changes the alternative prophesied by saying, "It is said that Mr. Brown now has reached the point where he will have to produce money or suffer the amputation of property possessions credited to him," which is itself an insinuation that he was carrying property in his name which did not belong to him, and thus obtaining false credit. The frequent references throughout the article to the plaintiff's connection with an evening paper published in competition with the defendant's journal, as well as the whole

tone of the article and its reference to the plaintiff, show that the motive of the publication was to do personal injury to the plaintiff from dislike and ill will, and not the giving to the public a fair and truthful report of the litigation which is made the occasion of it.

Some of the innuendoes in the declaration may not be justified by the language; but these must be treated as surplusage, since there is enough in the article which is libelous without explanation. *Porter v. Post Publishing Co.*, 20 R. I. 88, 37 Atl. 535. The case in that respect is like the one considered in *Haynes v. Clinton Printing Co.*, 169 Mass. 512, 515, 48 N. E. 275, where it is said by Holmes, J.: "It is not necessary to state these innuendoes in detail, or to consider whether they are all borne out by the words; for, if they are not, they may be rejected as surplusage, when, as here, the words, read as ordinary persons would understand them, are libelous per se. It is settled in England, and so far as the question has arisen in this country, in accordance with good sense, that to that extent the plaintiff was not debarred from relying on the wrong alleged and complained of merely because he interpreted it as going farther than it did in fact"—citing numerous cases. It appears in evidence that this report, after being written, was submitted to the scrutiny of at least two of the defendant's officials before publication; hence we must take the article to be the deliberate utterance of the defendant, and the expression of its well-considered temper and attitude towards the plaintiff. In consequence of this publication, the defendant [plaintiff], who had been engaged in business in this community for 30 years, was required by the bank with which he was accustomed to deal to furnish a statement of assets and liabilities, and he was compelled to submit to this humiliation as if he had been suspected of insolvency. He further testifies to a considerable loss of trade in a neighboring city where this paper was circulated. These elements of actual damage are necessarily indefinite as data for computation in money of the injury done, but the case is one which forbids the assessment of merely nominal damages. Taking into account the circulation of the paper, which was admitted at the trial to be 32,000 copies per diem, and all the other circumstances of the case, I do not consider the sum of \$1,500 as an excessive remuneration to the plaintiff for what he must have suffered from this libel, and I assess the damages at that amount.

Decision for the plaintiff for \$1,500 and costs.⁶⁹

⁶⁹ Accord, *D'Auxy v. Star Co.* (1900) 31 Misc. Rep. 388, 64 N. Y. Supp. 283 (report included what purported to be remarks of counsel); *Dorr v. U. S.*, 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697 (following headlines used, "Traitor, Seducer, and Per-

TRESKA v. MADDUX.

(Supreme Court of Louisiana, 1856. 11 La. Ann. 206, 66 Am. Dec. 198.)

SPOFFORD, J.⁷⁰ (MERRICK, C. J., absent). The defendant has appealed from a judgment for \$1,000, rendered against him upon the verdict of a jury as damages for the publication of a libel against the plaintiff in the Crescent newspaper.

The plaintiff, captain of a schooner in the Tampa Bay trade, was arrested in New Orleans in July, 1852, and imprisoned upon an affidavit made by a policeman before one of the recorders, to the effect that he had been informed, and verily believed that the plaintiff, and others on board his schooner, the George Lincoln, were guilty of robbing the dead bodies of certain persons who had been killed by an explosion upon the steamboat St. James, and had been found floating upon the lake.

The defendant, proprietor of the Crescent newspaper, was not the writer, and perhaps was absent at the time. But one of his regular employees, having learned of the arrest of the plaintiff, and read the affidavit made against him, before any examination was had, wrote and caused to be published in the defendant's paper the exaggerated and inflammatory article which constitutes the libel in question.

This article assumes and proclaims the guilt of the plaintiff, and, going far beyond the affidavit really made, treats of his general character and history as that of a noted criminal. It speaks of his "suspicious-looking schooner known to be manned by some nurslings of crime long marked by the officers of the law," and of her owner, whom the captain of police "had known through long years for his piratical inclinings," and adds that "a land and water rat was this skipper of the schooner, and a pet of criminal justice during many a day." Capt. Tresca and his crew, described by name, are said to have come into port "flushed with successful booty, and bold through previous immunity," and to have been immediately arrested by the vigilant police, and Tresca especially is painted as a "brawny, thick-set, low-browed bandit, and to all appearances,

"'As mild a mannered man
As ever scuttled ship or cut a throat.'"

The article created a sensation, as it was probably intended to do. And although it shortly turned out to be wholly un-

jurer"); *Commercial Pub. Co. v. Smith*, 149 Fed. 704, 79 C. C. A. 410 (in reporting an arrest, used the headline, "Murderer Arrested"). For statutory condemnation of remarks and comments, see page 100, *supra*, footnote.

⁷⁰ Part of the opinion is omitted.

justifiable and mostly untrue, it is proved to have caused the plaintiff the loss of some freight the next trip of his schooner. Upon the preliminary examination, there appeared to be no evidence to criminate him, and his reputation as an honest and inoffensive citizen was vindicated by subsequent articles in the *Crescent*, written by the employees who had penned the libel.

The answer of the defendant admits that he published the article charged as a libel, and admits that it was false.

By way of defense, there is a denial of malice in the publication; an averment that the records of the recorder's court, of which it is customary for newspapers to make notes, had misled the defendant; that on discovering the error he had instantly retracted it publicly in his newspaper, and that the petitioner had expressed and confessed himself satisfied with the amends.

The first point relied upon by the defendant is, that there was no malice in the publication. No express malice was proved. Indeed it may be assumed that the defendant, when he made the publication, did not know who Captain Tresca was, and therefore could have had no special malice against him. But in actions of this character malice is often implied. At common law, if the words spoken or published are in themselves actionable (as if they import an accusation of an indictable offense), malicious intent is an inference of law, and therefore needs no proof. 2 Green. Ev. § 418(4). In this case malice does not mean a spite against the individual, but *malus animus*, a wanton disposition, grossly negligent of the rights of others. We think the jury might properly have inferred such malice under the circumstances of the case. *Cauchoix v. Dupuy et al.*, 3 La. 208.

As a chronicler of events that actually occurred, the defendant had a right to report the fact that the plaintiff had been arrested and held for examination on a particular charge. But he had no right to go beyond this, assume the guilt of the plaintiff upon an *ex parte* charge, heap accusations of other crimes upon his head without any foundation and villify his character before the public, except upon the responsibility of proving the truth of his accusations when sued for libel. The tenor of the article in this case was to charge the plaintiff with the high crime of piracy. The defendant has not shown that he had any grounds to suppose such to have been, as charged, the occupation of the plaintiff, or that the charge was made with good motives and for justifiable ends.

The reparation made, by recanting the charges the day after they were made, was proper to be considered by the jury in estimating the amount of damages, but could not, as the ap-

pellant contends, exonerate him entirely. The injury had been done. "*Vox semel missa non revertit.*" The slander, circulated by one issue of the paper, could not be wholly obliterated by the recantation in another. All who saw the first may not have seen the last. And it is difficult wholly to restore a reputation thus positively and publicly accused of the highest crimes known to the law. * * *

Judgment [for the plaintiff] affirmed.

(D) PROCEEDING JUDICIAL, WHEN—REPORT FAIR, WHEN

COWLEY v. PULSIFER.

(Supreme Judicial Court of Massachusetts, 1884. 137 Mass. 392, 50 Am. Rep. 318.)

HOLMES, J. This is an action against the owners and publishers of the Boston Herald for a libel printed in that newspaper. The alleged libel was a report of the contents of a petition for the removal of the plaintiff, an attorney at law, from the bar. The report was fair and correct, but the petition included allegations which would be actionable unless justified. In their answer the defendants rely upon privilege; and the main question raised by the plaintiff's exceptions is whether the publication was privileged, as ruled by the court below.

The petition had been presented to the clerk of the Supreme Judicial Court for the county of Middlesex in vacation, had been marked by him, "Filed February 23, 1883," and then or subsequently had been handed back to the petitioner, but it did not appear that it ever had been presented to the court or entered on the docket.

We are of opinion that the foregoing circumstances do not constitute a justification, and that the defendants do not bring themselves within the privilege admitted by the plaintiff to attach to fair reports of judicial proceedings, even if preliminary or *ex parte*.

No binding authority has been called to our attention which precisely determines this case, and we must be governed in our conclusion mainly by a consideration of the reasons upon which admitted principles have been established.

We begin by recalling the familiar distinction between the privilege of the petitioner in respect of filing his petition, and the privilege of the same or any other person in respect of subsequently printing it in the newspapers, or otherwise publishing it to strangers who have no interest in the matter. This

distinction, we believe, has always been recognized, both before and since the case of *Lake v. King*, 1 Saund. 120, 133; s. c. 1 Lev. 240; *Weston v. Dobniet*, Cro. Jac. 432; *Rex v. Creevey*, 1 M. & S. 273, 280; *McGregor v. Thwaites*, 3 B. & C. 24, 31, 35; *Flint v. Pike*, 4 B. & C. 473, 481; *Commonwealth v. Blanding*, 3 Pick. 304, 317, 15 Am. Dec. 214. We therefore lay on one side all cases which only tend to show that the petitioner incurred no liability by handing his petition to the clerk, and by whatever publication that involved, and we shall assume, for the purposes of this case, that he incurred no liability by so doing.

The privilege set up by the defendants is not that which attaches to judicial proceedings, but that which attaches to fair reports of judicial proceedings. Now what is the reason for this latter? The accepted statement is that of Mr. Justice Lawrence in *Rex v. Wright*, 8 T. R. 293, 298: "Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings." See also *Davison v. Duncan*, 7 El. & Bl. 229, 231; *Wason v. Walter*, L. R. 4 Q. B. 73, 88; *Commonwealth v. Blanding*, 3 Pick. 314, 15 Am. Dec. 214.

The chief advantage to the country which we can discern, and that which we understand to be intended by the foregoing passage, is the security which publicity gives for the proper administration of justice. It used to be said sometimes that the privilege was founded on the fact of the court being open to the public. *Patteson, J.*, in *Stockdale v. Hansard*, 9 A. & E. 1, 212. This, no doubt, is too narrow, as suggested by Lord Chief Justice Cockburn in *Wason v. Walter*, *ubi supra*; but the privilege and the access of the public to the courts stand in reason upon common ground. *Lewis v. Levy*, El., Bl. & El. 537, 558. It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

If these are not the only grounds upon which fair reports of judicial proceedings are privileged, all will agree that they are not the least important ones. And it is clear that they have no

application whatever to the contents of a preliminary written statement of a claim or charge. These do not constitute a proceeding in open court. Knowledge of them throws no light upon the administration of justice. Both form and contents depend wholly on the will of a private individual, who may not be even an officer of the court. It would be carrying privilege farther than we feel prepared to carry it, to say that, by the easy means of entitling and filing it in a cause a sufficient foundation may be laid for scattering any libel broadcast with impunity. See *Sanford v. Bennett*, 24 N. Y. 20, 27; *Lewis v. Levy*, *ubi supra*; *Barber v. St. Louis Dispatch Co.*, 3 Mo. App. 377.

We waive consideration of the tendency of a publication like the present to create prejudice, and to interfere with a fair trial. *Barrows v. Bell*, 7 Gray, 301, 312, 316, 66 Am. Rep. 479; *In re Cheltenham & Swansea Railway Carriage & Wagon Co.*, L. R. 8 Eq. 580; *Tichborne v. Mostyn*, L. R. 7 Eq. 55, note; *Read & Huggonson's Case*, 2 Atk. 469; *s. c. nom. Roach v. Garvan*, 2 Dick. 794. Neither shall we discuss the question what limitations there are, if any, to the requirement that the proceeding must have been acted on and decided. *Barrows v. Bell*, *ubi supra*; *Delegal v. Highley*, 3 Bing. N. C. 950, 963. For apart from the distinction between what takes place in open court and the contents of papers filed in the clerk's office, it might be said that these considerations apply with equal force to a report of proceedings in court published from day to day as they take place, and that nevertheless it has been held that reports might be so published, and that it is not necessary to wait until a trial is completed. *Lewis v. Levy*, *ubi supra*. See *Usill v. Hales*, 3 C. P. D. 319, 325. The practice of publishing reports in this manner is universal with us, and we may concede that it might happen that the proceedings of the first day stopped with the reading of the pleadings, or, in this case, of the petition, and that a fair report under those circumstances would be privileged, without considering whether a publication of the first day's proceedings could be made actionable by relation if the subsequent ones should be omitted.

For the purposes of the present case, it is enough to mark the plain distinction between what takes place in open court, and that which is done out of court by one party alone, or more exactly, as we have already said, the contents of a paper filed by him in the clerk's office. This distinction, although not established by them, derives an indirect sanction from the cases which have turned on the question whether the proceedings—for instance, the examination of a bankrupt—took place in a public court. *Ryalls v. Leader*, L. R. 1 Exch. 296; *Lewis v.*

Levy, *ubi supra*. See also *Fleming v. Newton*, 1 H. L. Cas. 363, 378.

It is further to be noticed that the language of Chief Justice Shaw in *Barrows v. Bell*, *ubi supra*, clearly implies that the privilege claimed by the defendants does not protect them. He says that a fair statement of the proceedings, "when they have been acted upon and decided, made with an honest view of giving useful information, and where the publication will not tend to obstruct the course of justice and interfere with a fair trial, is not a libelous publication." In the English chancery it is held to be a contempt of court to publish a pleading of one party in a newspaper, or, it would seem, the whole proceedings, before the matter has come on to be heard. In *re Cheltenham & Swansea Railway Carriage & Wagon Co.*, *ubi supra*; *Bowden v. Russell*, 46 L. J. (N. S.) Ch. 414, 416; *Cann v. Cann*, 3 Hare, 333, note; s. c. 2 Ves. Sr. 520, 2 Dick. 795. A contempt of court cannot be privileged, and we see no reason to doubt that an action could be maintained for such a publication. *Bowden v. Russell*, *ubi supra*. Nor do we see any reason for confining the liability to proceedings in equity. "If one exhibit a scandalous bill, if the court hath jurisdiction of such matters, an action lies not; otherwise it is, if the court have not jurisdiction; or having, if the party publish his bill abroad, the said bill being false." *Weston v. Dobniet*, *ubi supra*. See further *Delegal v. Highley* and *Barber v. St. Louis Dispatch Co.*, *ubi supra*.

We have placed only a qualified reliance on the cases cited, because some of them were decided too early to be conclusive, and those on the question of contempt have been placed on grounds not perhaps convincing with regard to the present question. But they lend strong support to our decision.

It may be objected that our reasoning tacitly assumes that papers properly filed in the clerk's office are not open to the inspection of the public. We do not admit that this is true, or that the reasons for the privilege accorded to the publication of proceedings in open court would apply to the publication of such papers, even if all the world had access to them. But we do not pause to discuss the question, because we are of opinion that such papers are not open to public inspection. A different conclusion might be drawn from a hasty reading of the Pub. Statutes, c. 37, § 13, but the county records or files, which are there ordered to be open for public inspection and examination and of which any person may take copies, are the records and files of the county, not of the courts of the commonwealth within and for that county. We see no reason to suppose that the Public or General Statutes were intended entirely to change the scope of the original enactments which they embodied.

These were the Sts. of 1851, c. 161, and 1857, c. 84, both of which will be seen on inspection to have no reference to the records of the courts.

We have assumed, for the purposes of this discussion, that the petition was rightly filed, and that the defendants were entitled to any benefit which they might derive from that circumstance. But we do not mean to intimate any opinion one way or the other upon the question.

Exceptions sustained.⁷¹

⁷¹ The decision is that the report of this legal proceeding was not privileged, because it had proceeded no further than the filing of the first pleading in the office of the clerk. In none of its aspects had the case come before a judge. The decision is not, therefore, inconsistent with *Metcalf v. Times Publishing Co.*, 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900, *supra*, for in that case the judge had been brought into the case as indicated by the issuance of the preliminary injunction. The rule of *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318, is followed in practically all the states. See, in accord therewith: *Lundin v. Post Publishing Co.*, 217 Mass. 213, 104 N. E. 480, 52 L. R. A. (N. S.) 207, in which the court says: "It is not open to dispute that a fair report in a newspaper of pending judicial proceedings is proper, and that this privilege extends to all matters which have been made the subject of judicial proceedings, though such proceedings may be merely preliminary, or interlocutory, or even *ex parte*. For example, it will render privileged a fair report of the charges made in a bill in equity which has been presented to the court, and *upon which the court has acted* by making an order that the defendants shall appear and show cause why an injunction shall not be issued against them. *Kimball v. Post Publishing Co.*, 199 Mass. 248, 85 N. E. 103, 19 L. R. A. (N. S.) 862, 127 Am. St. Rep. 492; *Kimber v. Press Association*, [1892] 1 Q. B. 65, 71. So it will extend to fair and accurate reports of hearings had upon applications for the issuance of warrants or other criminal process, or upon hearings had after such process has been issued, though they be not final trials upon the merits." *Nixon v. Dispatch Printing Co.*, 101 Minn. 309, 112 N. W. 258, 12 L. R. A. (N. S.) 188, 11 Ann. Cas. 161, holding the publication of extracts from a bill for a divorce, which had been filed and served, not privileged. The court said: "The distinction between a complaint and judicial proceedings proper is clear. The first is *ex parte*, not subject to the control of the court in the first instance; the clerk must file it, and the publication can in no manner serve the administration of justice, or any other legitimate object of public interest. The last are had in court under the control of the judge, where both sides may be heard. A fair report of such a proceeding would include the claims of all parties as made in court. It is the publication of such a report only that is privileged." *Williams v. New York Herald Co.*, 165 App. Div. 529, 150 N. Y. Supp. 838.

In Texas a statute requires the clerk to enter in the docket the names of the parties and the object of the suit, when one is filed. Another statute renders reports of "judicial proceedings" or of "other official proceedings authorized by law in the administration of law" privileged. In the light of these two statutes it was held, in *Belo & Co. v. Lacy* (Tex. Civ. App.) 111 S. W. 215, that the following item copied from the docket was privileged, viz.: "The State of

METCALF v. TIMES PUB. CO.

(Supreme Court of Rhode Island, 1898. 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900.)

Trespass on the case for libel. Heard on demurrer to defendant's special plea in justification.

SRINNESS, J. The plaintiff sues to recover damages for a libel alleged to have been printed in the Evening Times, a newspaper in Pawtucket, published by the defendants. The declaration sets out that upon the filing of a bill in equity by Annie Campbell against the plaintiff and other associates in business, charging them with having conspired to defraud her deceased husband, Duncan H. Campbell, of certain letters patent of this and foreign countries, and upon the order by a justice for citation, and an ex parte preliminary injunction⁷² until hearing, the defendants published the charges of fraud, to the damage of the plaintiff. The defendants pleaded specially that the said Evening Times was a public newspaper; that they published said matters because they believed them to contain information which it was important for the public to know; that said matters were a part of the public records of this court, upon which there had been judicial action, which, denying all malicious intent, it was lawful for them to do. The plaintiff demurs to the plea.⁷³

Texas v. [Plaintiff] and Others. Penalty for keeping disorderly house."

In Thompson v. Powning, 15 Nev. 195 (1880), it is apparently taken for granted that a complaint may be published before any action in court.

The common-law rule in Ohio, which was in accord with Cowley v. Pulsifer, supra, has been changed by statute. See Page & A. Gen. Code, § 11343—2 which provides as follows: "The publication of a fair and impartial report of the return of any indictment, the issuing of any warrant, the arrest of any person accused of crime, or *the filing of any affidavit, pleading or other document in any criminal or civil cause in any court* of competent jurisdiction, or of a fair and impartial report of the contents thereof, shall be privileged, unless it be proved that the same was published maliciously, or that the defendant has refused or neglected to publish in the same manner in which the publication complained of appeared, a reasonable explanation or contradiction thereof by the plaintiff, or that the publisher has refused, upon request of the plaintiff, to publish the subsequent determination of such suit or action: Provided, that nothing in this act shall authorize the publication of blasphemous or indecent matter."

⁷² An ex parte preliminary injunction is issued by a judge in chambers; i. e., not in open court, and without any opportunity at that time to the defendant to be heard. See page 26, supra.

⁷³ By demurring, the plaintiff conceded the facts which the defendant had pleaded and asked the court to decide that, as a matter of law, they did not make out a legal excuse.

Two questions of law are thus raised: First, does the privilege to

The question of privileged publications is one that has been much considered, and certain lines may now be said to be well established. In *Rex v. Wright*, 8 Term R. 293, in 1799, which was an application for a criminal information for libel growing out of the *Horne v. Tooke* Case, it was held that a report of the house of commons could be published, even though it reflected on the character of an individual. *Hoare v. Silverlock*, 9 C. B. 20, was to the effect that a full and impartial report of a trial in a court of justice could be published. Some stress was laid upon the distinction between a full trial and an *ex parte* proceeding, which, however, was not necessary to the decision of the case. *Davison v. Duncan*, 7 El. & Bl. 229, held that a fair report of defamatory matter uttered in a public meeting was not privileged. *McGregor v. Thwaites* (1824) 3 Barn. & C. 24 (10 E. C. L. 6), held that proceedings before a magistrate, not judicial, but advisory, were not privileged; and *Duncan v. Thwaites*, 3 B. & C. 556 (10 E. C. L. 179), extended the rule to proceedings which took place in the course of preliminary inquiry before a magistrate. *Lewis v. Levy*, El., Bl. & El. 537, questioned the decision in *Duncan v. Thwaites*; and although the case was understood to hold that the privilege of a fair report extended to proceedings taking place publicly before a magistrate on the preliminary investigation of a criminal charge, terminating in the discharge of the prisoner, yet the court did not expressly decide that question. *Reg. v. Gray*, 10 Cox, Cr. Cas. 184, carried the rule to this extent, but the court was not unanimous in the decision. In *Usill v. Hales* (1878) 47 Law J. Q. B. 323, Lord Coleridge, C. J., fully adopted the apparent rule of *Lewis v. Levy*; and Lopes, J., concurring, said: "There are authorities which, until they are carefully examined, would seem to support the contention that an *ex parte* proceeding in court is not privileged. So far as I can ascertain, these are cases where the proceeding was preliminary, and where there was no final determination at the time of the alleged libelous report."

In *Wason v. Walter*, L. R. 4 Q. B. 73, the dictum of Cockburn, C. J., goes further—that fair reports of all *ex parte* proceedings are privileged. *Ryalls v. Leader*, L. R. 1 Exch. 296, held that the examination of a debtor in custody, before

publish legal proceedings attach before they reach the open court stage? And second, does the publication of a part of the proceedings only, viz. that part alone which contains the defamatory matter, constitute a fair report? The first question was decided in the affirmative, and the second in the negative, thus making a judgment for the plaintiff necessary.

a registrar in bankruptcy, was a proceeding before a public court, and hence privileged. In *Kimber v. The Press Association*, [1893] 1 Q. B. Div. 65, the court went to the full length of holding that the publication of a fair report of proceedings held in open court, though preliminary and ex parte, is privileged. This case is quite remarkable from several facts. It was an application to magistrates, specially called together by the clerk, for a summons to one charged with perjury, and no evidence was given under oath. The application was granted, and one of the principal questions argued was whether it was an open court. It was also held that the matter was one for final determination, because if it was refused it would be final, and if it was granted there would be a further inquiry, and the matter might go on to trial. Following the outline of leading decisions, in which there has been a gradual progress, the law of England seems now to be that a full and fair report of proceedings in an open court, upon a matter standing for final decision, even though the inquiry may be preliminary and ex parte, is privileged. See opinion of Kay, L. J., in *Kimber v. Press Association*.

In this country the law has been declared in very much the same way. In *Cincinnati Gazette v. Timberlake* (1860) 10 Ohio St. 548, it was held that privilege does not extend to the publication of preliminary proceedings merely, which are of a purely ex parte character. The opinion, however, follows the earlier English cases. *Barber v. St. Louis Dispatch*, 3 Mo. App. 377, laid down this rule: "Where a court or public magistrate is sitting publicly, a fair account of the whole proceedings, uncolored by defamatory comment or insinuation, is a privileged communication, whether the proceedings are on a trial or on a preliminary and ex parte hearing. But the very terms of the rule imply that there must be a hearing of some kind. In order that the ex parte nature of the proceeding may not destroy the privilege—to prevent such a result—there must be at least so much of a public investigation as is implied in a submission to the judicial mind with a view to judicial action." In this case a petition for divorce had been filed, but it had not been presented to a court, at any sitting, with a view to judicial action. In *Park v. Detroit Free Press*, 72 Mich. 560, 40 N. W. 731, it was held that the publication of the pleadings or other contents of the files in a private suit before hearing or action in open court is not privileged. *McBee v. Fulton*, 47 Md. 403, held that an examination before a magistrate, whether the accused permits it to be ex parte, or whether he makes defense, is privileged, upon the ground that it is a proceeding before a public court

of justice. In New York a statute of 1854, limiting actions for the publication of a fair and true report of judicial proceedings to cases of malice, was held to be declaratory of the common law, in *Ackerman v. Jones*, 37 N. Y. Super. Ct. 42, and that under the statute an *ex parte* affidavit presented to a police magistrate to obtain a search warrant was privileged.

Cowley v. Pulsifer, 137 Mass. 392, contains a full review of this subject by Mr. Justice Holmes. It was an action for libel in publishing a petition for the removal of an attorney from the bar, which had not been presented to the court. The question, therefore, was quite different from the one before us; but the court assumes the rule admitted by the plaintiff in that case—that the privilege attaches to fair reports of judicial proceedings, even if preliminary and *ex parte*. The rule as thus stated seems now to be settled as the law both in England and in this country, and it makes a clear line of distinction between publications which are lawful and those which are not. It gives no license to publish libelous matter simply because it is found in the files of a court. As a publisher of news and items of public importance the press should have the freest scope, but as a scandal monger it should be held to the most rigid limitation. If a man has not the right to go around to tell of charges made by one against another, much less should a newspaper have the right to spread it broadcast and in enduring form. It is necessary to the ends of justice that a party should be allowed to make his charges against another, for adjudication, even though they may be of a libelous character, and as such they are privileged; the injured party having a remedy for malicious prosecution when they are made maliciously or without probable cause. But the right of a party to make charges gives no right to others to spread them. When the charges come up for adjudication, however, although their publication may be as harmful and distressing to the person accused as if they had been published before their consideration by a court, a different rule applies. Individual feelings are no longer considered, for the reason, as stated by Judge Holmes: "It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself, with his own eyes, as to the mode in which a public duty is performed."

Accepting and applying the rule as we understand it to be, two questions arise: First, does the plea set forth a proceed-

ing before a court? and, second, does it aver it to be a full and fair report?

As to the first question, it sets out an application in chambers upon a motion for an *ex parte* injunction before and until a hearing. Ordinarily the only consideration which is or can be given to it is whether the bill states an exigency, upon its face, sufficient to warrant an order to hold property in statu quo until a hearing can be had. This is indeed a judicial matter, but of the most insignificant sort, and very near to the border line. It is a matter submitted to a judge, and he acts upon it. It is within the rule and the cases which we have referred to—notably, that of *Kimber v. Press Association*, supra. If this was not judicial action, it would be difficult to say what would be, short of a full trial of the case. Although the motion was in chambers, still, under our practice, as all such motions and interlocutory orders are made in chambers, technically we cannot say that it was not in court. The statutes provide for such motions to be made to the court, and the provisions about the court “in chambers” are simply to distinguish such proceedings from those of the appellate division sitting in banc. We therefore decide that the plea sets out a sufficient statement of a proceeding in court.

As to the second question, to bring the plea within the rule of a full and fair report, the plea is bad upon its face. It avers that what is published was only a part of the bill, and this part, so far as shown, was only the four paragraphs charging fraud. It does not aver that the defendants gave a full and fair report, even in substance, of the allegations and facts set out in the bill. The plea rests upon the fact that, as the bill had been before a judge in a judicial proceeding, it was a justification in publishing a part of it. That is not enough. If a garbled report of a trial, which may result in a vindication of one accused, is not privileged, much less should unfair extracts from pleadings be privileged. This doctrine is strongly set forth in caustic words by Endlich, J., in *Com. v. Costello*, 1 Pa. Dist. R. 745-752: “I prefer to rely upon the proposition, which seems to me incontestable, that whether the proceeding be in a court of record or not, finished or unfinished, *ex parte* or otherwise, no individual and no newspaper has the right to publish mere arbitrary selections, consisting of those portions which impute crime or moral turpitude to, or cast ridicule or odium upon, the party to whom they refer, and commending themselves only by what is sometimes called ‘spiciness,’ but is more properly denominated ‘filth,’ or by reason of the fact that they tickle the morbid appetite of perverted human nature, which delights in the spectacle of another’s disgrace.”

Upon this ground, therefore, the demurrer to the plea is sustained,⁷⁴ and the case will be remitted to the common pleas division for further proceedings.⁷⁵

McCLURE et al. v. REVIEW PUB. CO.

(Supreme Court of Washington, 1905. 38 Wash. 160, 80 Pac. 303.)

DUNBAR, J. This is an action to recover damages for alleged libelous articles published of and concerning the plaintiff Anna McClure in respondent's newspapers, the Daily Spokesman-Review and the Twice-a-Week Spokesman-Review. The plaintiffs, on their own motion, amended the original complaint; and, as amended, defendant moved to make the same more definite and certain by furnishing or incorporating in it copies of the entire articles in which the alleged libelous matter appeared. This motion was sustained, and an exception taken to the court's ruling. The second amended complaint was filed, incorporating the entire articles complained of. This complaint was demurred to on the ground that it did not state a cause of action. The demurrer was sustained, the plaintiffs declined to further plead, the court gave judgment dismissing the action and for costs, and from such judgment this appeal is taken.

The first error assigned is the action of the court in sustaining the motion to make the complaint more definite and certain. We do not think the court committed error in this

⁷⁴ The decision thus is favorable to the plaintiff. But only one of the plaintiff's contentions was sustained, viz. that the facts pleaded by the defendant did not indicate that the report was fair. The fact that the proceeding had only reached the ex parte stage would not in the opinion of the court deprive the defendant of the privilege of reporting it. But the report of any judicial proceeding must be fair. In this case the report was declared not fair, because it reported only that part of the case which related to the alleged fraudulent conduct of the plaintiff. It was therefore only a partial report, dictated as to its scope by an eye single to scandal.

⁷⁵ Accord: American Publishing Co. v. Gamble (1906) 115 Tenn. 663, 90 S. W. 1005 (publication of bill in chancery, after ex parte proceeding resulting in issuance of preliminary injunction). The opinion also contains the following dictum: "The report need not be a verbatim one, but it must contain the substance of the thing it undertakes to present, or the whole purport of any special, separable part. * * * It must not give undue prominence to inculpatory facts, and depress or minify such facts as would explain or qualify the former." Also see Boogher v. Knapp, 97 Mo. 122, 11 S. W. 45, holding that whether a report is to be considered fair and impartial depends upon whether "verbatim report of the proceedings would have the same effect on his [plaintiff's] character as the report made."

respect. An alleged libelous newspaper article, like every other article, agreement, or instrument in writing, the meaning of which has to be ascertained, must be construed in connection with and with reference to the entire article, and no intelligent construction can be obtained by a perusal of excerpts or disconnected extracts from the publication. In this case the complaint objected to simply extracted from the articles published certain words and lines which it alleged to be libelous. A glance at the said words and lines, when presented in their proper connection with and in relation to the whole article, shows the futility of undertaking to justly construe these words and lines, segregated from the article as a whole. We do not think that the authorities which are cited by the appellants sustain their contention, but that the rule which we have announced is universal. The amended complaint presented four articles which were alleged to be libelous, or, rather, three articles; one of them having been published in the *Spokesman-Review*, and also in the *Twice-a-Week Spokesman-Review*. The articles as published were as follows:

Article of December 14, 1901:

"Queen of Burglars.

"Remarkable Charge against Mrs. McClure of the Calispel Valley.

"Arrested While Milking.

"Tacoma Chief of Police Went into the Wilds in Search of Flora Dubois.

"After weeks of hard work by detectives, Mrs. William McClure, who is said to have the stage name of Flora Dubois, and *who is wanted at Tacoma on the charge of burglary*, was arrested at her little log house in the wild country of Calispel valley, Stevens county. The arrest was made by Chief of Police Fackler of Tacoma, in company with detective McDonald of the local police force, on Thursday morning. She asserts her innocence.

"She was brought to Spokane yesterday morning by the officers over the Great Northern, her husband accompanying. William McClure, the husband, is a prominent rancher of the Calispel country. After two hours here they left on the Northern Pacific for Tacoma, the woman still in custody.

"Strange and Romantic.

"Strange and romantic has been the history of Mrs. William McClure, otherwise known as Flora Dubois, actress and variety girl. Originally from the east, she drifted early in life to the western vaudeville stage, remaining in this career

18 years. She had started it at 12. Sometime during this interval McClure met the actress, was enamoured, and married her.

"For a time Mrs. McClure lived quietly on the little Calispel dairy farm, and then, it is said, *the restraints of rural life grew too great, memories of the past crowded in, and she left for Tacoma, where, according to the police and press of that city, she entered on a different career to any followed hitherto—that of a leader and organizer of burglars.*

"It is alleged that for a time Flora Dubois—she had resumed her old stage name—was queen over a class of men like these, and that a series of startling burglaries, so well manipulated that detection was found impossible, was the result. Then a clue leaked out, Tacoma detectives got on the trail and began to close in, and it is said the Dubois woman left for the tranquillity of her Calispel home again.

"In the meantime in Tacoma, one of the gang had been arrested. Charles E. Jackson was his name, and when taken to police headquarters and confronted with evidence Jackson weakened and gave away the system. It is said he incriminated with himself and a man named Leckie, the picturesque Flora Dubois, whose then whereabouts was unknown. Jackson is still in Tacoma jail, pending developments in the case. With him is Leckie.

"Hearing she had gone to Spokane, Chief Fackler, of the Tacoma police department came here in person, only to find Mrs. Dubois had gone north. Fackler, too, went north with the above result. Officer McDonald had previously been working on the case.

"The following description of the arrest and particulars is given by Detective McDonald of the local force:

"Arrested While Milking.

"*We found our woman amid the pastoral scenes of the Calispel valley milking cows. It was a peculiar scene. McClure claims to have been an editor of the New York Journal at one time, and it was a strange scene to see an actress and an editor far from centers of population in northern Washington, the woman wanted as a professional thief and the man bound to protect her. She did not take the arrest hard, but said she could prove a clear case of innocence. During October and November, when the burglaries of Tacoma were committed, she claims to have been doing a variety stunt in Victoria, B. C. We were accorded permission to make a full search of the house, but none of the missing jewelry could be found. They were living alone in a small log cabin surrounded by stock of all kinds.*

"Mrs. McClure is about 30 years old, of dark complexion

and a handsome woman. She is medium height, comparatively stout, with clear-cut French features. She bears up well under the situation."

Article of December 16, 1901:

"Mystery of Flora Dubois.

"Alleged Young Woman Burglar is Identified.

"Tacoma, Wash., Dec. 15.—The preliminary hearing of Flora Dubois, or Williams, the handsome young woman charged with receiving the goods stolen by a gang of burglars that worked various north end residences during November, will occur in the police court Tuesday. The men who are supposed to have committed the actual burglaries will be up to-morrow.

"The man Jackson has confessed to the crimes, and to-day positively identified the woman. His evidence will be an important factor in the cases against the woman and the other men.

"Jackson holds firmly to his original story, and is positive in his assertion that Flora Williams is the woman who was rooming in the Sherman house, where the trunk containing her photographs was found by the police after the occupant of the room had disappeared. On the other hand, Mrs. Williams and her husband maintained that they can prove a complete alibi, Mrs. Williams not having been in this city for two years.

"The case against the woman depends upon the evidence of Jackson and the discovery of two of her photographs in the room Jackson said she had occupied."

Article of December 20, 1901:

"Mrs. McClure Released.

"Supposed Burglar Queen Let Go by Tacoma Police.

"Spokane Officers Who Co-operated in the Arrest, Much Interested in the Developments in the Case—Looks Like a Case of Mistaken Identity—Who Mrs. McClure is.

"The local police are much interested in the report that Mrs. Laura McClure, who was arrested on a ranch near Usk, Stevens county, on the charge of having been the leader of a gang of burglars operating in Tacoma, has been released, and another woman arrested and identified as the person really wanted.

"The Spokane police co-operated with Chief Fackler of Tacoma in arresting Mrs. McClure, and one of the detectives went to Usk with him when the arrest was made. The Spokane police say that one of the suspected burglars arrested

in Tacoma told Chief Fackler that in a certain room he would find a trunk containing stolen property. The room, the burglar declared had been occupied by the burglar queen.

"The detectives found the room and the trunk. In the trunk was a photograph of Mrs. McClure, who is a variety actress, and whose stage name is Flora Dubois. The man in jail identified the photograph as that of the female burglar, who was also said to be a variety actress. *After making inquiries among vaudeville performers Chief Fackler became satisfied that the woman he wanted was somewhere in Stevens county. He came to Spokane, and here made additional inquiries, which convinced him that the woman he wanted was at Usk. Thither he went, and there he found her, sure enough.*

"She was taken to Tacoma, protesting her innocence and her ability to prove an alibi. *The burglar identified her, it is said, as the woman from whom he formerly took orders in the art of burglary;* but others who knew the burglar queen declared she was not the woman, and the police evidently reached the same conclusion, for they have released her.

"Mrs. McClure is said to be a talented woman. Her husband, who is now a farmer, was formerly a New York newspaper man, and they are said to have a comfortable home at Usk. People who know Mrs. McClure say they are not surprised that she has been released, as they believe that a mistake was made. They say that if the real burglar queen was a variety actress it is not necessarily surprising that she had Mrs. McClure's picture in her trunk, or left it there when she fled from the room."

The italicized portions are the portions that are alleged by the appellants to be libelous. It would be profitless to enter into a minute analysis of any or all of these articles. The law of libel is well understood. The only question to be determined is whether there has been a sufficient charge of crime here to constitute the articles libelous. It will be seen by a perusal of the articles that there was no statement on the part of the newspapers of whether or not the said plaintiff was guilty of the crime with which she was charged; nothing which can be construed as imputing to her the commission of the crime; but that it only purported to be a statement of the acts and theories and representations of the officers of the law in relation to the pursuit, arrest, trial, and acquittal of the plaintiff; and while, undoubtedly, certain expressions in each of the publications, if construed without relation to the rest of the article in which they appear, would be libelous, yet, if construed as they must be with reference to the whole text, the libelous character cannot be established.

The articles are undoubtedly qualifiedly privileged. That being true, they are not libelous per se, and, no express malice being alleged, and there being nothing in the articles themselves, or in the circumstances surrounding their publication, to indicate malice—the desire evidently being only to publish sensational news in a sensational and somewhat flamboyant and embellished style—the publishers are not legally responsible in damages. We think, under the law announced by this court in *Kimble v. Kimble*, 14 Wash. 369, 44 Pac. 866, *Haynes v. The Spokane Chronicle Publishing Co.*, 11 Wash. 503, 39 Pac. 969, *Hall v. The Elgin Dairy Co.*, 15 Wash. 542, 46 Pac. 1049, *Urban v. Helmick*, 15 Wash. 155, 45 Pac. 747, and *Leghorn v. Review Publishing Co.*, 31 Wash. 627, 72 Pac. 485, that the demurrer to the amended complaint was properly sustained. This conclusion renders unnecessary a discussion or determination of the motion to dismiss.

The judgment is affirmed.⁷⁶

⁷⁶ This decision seems very doubtful, since it is not clear that the paper confined itself to what the proceedings, as such, revealed.

Reports of arrests and the facts connected therewith, in so far as they are revealed by the court records, and of the preliminary examinations of accused persons, are uniformly held to be conditionally privileged. See *Beiser v. Scripps-McRae Pub. Co.*, 113 Ky. 383, 68 S. W. 457 (report of application for arrest of Beiser on charge of horse stealing, though application denied); *Cass v. New Orleans Times*, 27 La. Ann. 214 (publication of terms of affidavit on which warrant issued); *McBee v. Fulton*, 47 Md. 403, 28 Am. Rep. 465 (report of preliminary examination); *Conner v. Standard Pub. Co.*, 183 Mass. 474, 67 N. E. 596; *Ackerman v. Jones*, 37 N. Y. Super. Ct. 42 (report of arrest and discharge). But compare *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 548, 78 Am. Dec. 285 (1860), and *Byers v. Meridian Printing Co.*, 84 Ohio St. 408, 95 N. E. 917, 38 L. R. A. (N. S.) 913 (1911), holding the report of an arrest upon warrant not privileged on the ground that there has been no judicial proceeding until the preliminary examination, and hence that the privilege does not attach until then. See to the same effect, *Todd v. Every Evening Printing Co.* (Del. Super. Ct.) 62 Atl. 1089.

See, also, *Stanley v. Webb*, 6 N. Y. Super. Ct. 21, 30: "It is our boast that we are governed by that just and salutary rule, upon which security of life and character often depends, that every man is presumed innocent of crimes charged upon him, until he is proved guilty. But the circulation of charges founded on ex parte testimony, of statements made, often under excitement, by persons smarting under real or fancied wrongs, may prejudice the public mind, and cause the judgment of conviction to be passed long before the day of trial has arrived. When that day of trial comes, the rule has been reversed, and the presumption of guilt has been substituted for the presumption of innocence. The chances of a fair and impartial trial are diminished. Suppose the charge to be utterly groundless. If every preliminary ex parte complaint, which may be made before a police magistrate with entire impunity, be published and scattered broadcast over the land, then the character of the innocent, who may be the victim of a conspiracy, or of charges proved afterwards to have arisen entirely from misapprehension,

KIMBALL, v. POST PUB. CO.

(Supreme Judicial Court of Massachusetts, 1908. 190 Mass. 248, 85 N. E. 103, 19 L. R. A. [N. S.] 862, 127 Am. St. Rep. 492.)

HAMMOND, J. The articles of which the plaintiffs complain contained reports of certain proceedings in court and also of a meeting of stockholders of a corporation called the Burrows Lighting & Heating Company.

So far as respects the report of the court proceedings the articles were privileged. This case differs materially from *Cowley v. Pulsifer*, 137 Mass. 392. In that case there had been no action by the court. Here the bill had been presented to the court and the court had acted upon it so far as to make a special order that the defendants therein should appear and show cause why they should not be enjoined. This act of the court was a judicial proceeding and, whatever might formerly have been the rule, it was a subject for a privileged report, although the cause had not yet been finished. It was an act begun in a case, and in the end there must be a final decision. The words of Esher, M. R., in *Kimber v. Press Ass'n* (1893) L. R. 1 Q. B. 65, 71, seem to us to be a true statement of the law on this subject: "I am, therefore, of opinion that where the proceedings are such as will result in a final decision being given, a final and accurate report, made bona fide, of those proceedings is privileged, although it be published before the final decision." And in that case the rule was applied to the proceedings upon an ex parte application for the issue of a summons on a charge of perjury. If this were not so then, in the language of Lord Esher, "the ridiculous result would follow that, where the trial of a case of the greatest public interest lasted 50 days, no report could be published until the case was ended." *Kimber v. Press Ass'n* (1893) L. R. 1 Q. B. 65, 71, and

may be cloven down, without any malice on the part of the publisher. The refutation of slander, in such cases, generally follows its propagation at distant intervals, and brings often but an imperfect balm to wounds which have become festered, and perhaps incurable. It is not to be denied that occasionally the publication of such proceedings is productive of good, and promotes the ends of justice. But, in such cases, the publisher must find his justification, not in privilege, but the truth of the charges." See, further, a well-reasoned article in 5 *Virginia Law Rev.* 513, entitled "Publication of Record Libel," which would go far beyond the present law, and would withhold defamatory court proceeding from publication until the trial is completed.

Report of Grand Jury.—The publication of the report of the grand jury, when it is returned into court, is conditionally privileged. *Sweet v. Post Pub. Co.*, 215 Mass. 450, 102 N. E. 660, 47 L. R. A. (N. S.) 240, Ann. Cas. 1914D, 533 (1913); *Parsons v. Age-Herald Pub. Co.*, 181 Ala. 439, 61 South. 345 (1913).

cases cited; *Metcalf v. Times Publishing Co.*, 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900, and cases cited; *McBee v. Fulton*, 47 Md. 403, 28 Am. Rep. 465; *Ackerman v. Jones*, 37 N. Y. Super. Ct. 43; *Stuart v. Press Publishing Co.* (N. Y.) 83 App. Div. 467, 82 N. Y. Supp. 401. See, also, the instructive case of *Usill v. Hales*, 3 C. P. D. 319, for a general discussion of the law upon this matter.

The articles in question contained among others the following statements: "At the office of C. Henry Kimball, 97 Haverhill street, officers, stockholders and lawyers interested in the Burrows Lighting & Heating Company met this morning. The affairs of the Burrows Lighting & Heating Company have been before the public for a considerable time and are apparently in a badly tangled condition. An order of notice was recently issued by the superior court against C. Henry Kimball, William Galletly and the Burrows Lighting & Heating Company, ordering them to appear in court on Thursday of this week to show cause why they should not be restrained from holding any meeting. The charges were that the holders of a majority of the capital stock of the company had fraudulently secured control over 416,000 shares of stock."

By an inspection of the bill in equity and of the order of the court it appears that the statement in the articles was a fair report of the court proceedings. And we are further of opinion that the ruling that the evidence did not warrant a finding of malice was correct. So far, therefore, as the plaintiff attempted to hold the defendants as to so much of the articles as related to the proceedings in court they failed to make out a case.

But there was something more in the articles than the report of the proceedings in court. There was a report of the meeting of the stockholders of a private corporation; and unless this part of the report is also privileged the defense, so far as resting upon that ground, must fail. It is argued by the defendants that "the public is interested and concerned in a meeting of stockholders of a corporation such as is described in the" articles in question, and that reports of such meetings are privileged if fair and made without malice. But the difficulty with this argument is that, unless modified by statutory provision, the law in England and in this commonwealth always has been otherwise. It is to be noted that we are not dealing with what is said at the meeting nor with the person who said it. No doubt a stockholder at such a meeting, speaking to stockholders, may with impunity say things derogatory to an officer or the manager of the company provided that what he says be pertinent to the matter in hand and he speaks in good faith and without malice. His justification rests upon the fact that

he is speaking to the stockholders upon a subject in which he and they have an interest.

On the contrary we are dealing with a report in the nature of a repetition of the defamatory remarks, which report is made by a stranger, having no interest in the question, to other strangers, called the public, equally without interest. It is manifest that the grounds for the privilege under which the original speaker, the stockholder, is protected cannot serve the publisher of the report. *Davison v. Duncan*, 7 El. & Bl. 231; *De Crespigny v. Wellesley*, 5 Bing. 402. The privilege of the publisher, if any he has, must rest upon other grounds.

It is stated by some authorities that by the common law of England reports of judicial and parliamentary proceedings alone were privileged. While it is said by Shaw, C. J., in *Barrows v. Bell*, 7 Gray, 301, 66 Am. Dec. 479, that this statement, unqualified, is too broad, still subsequent decisions seem to show clearly that in England the principle of privilege is confined to reports of judicial or quasi judicial bodies. No privilege was attached to the report of other public unofficial meetings. Hence, if in such a case a report containing any defamatory statement of fact was printed in a newspaper the proprietor's only defense was that the statement was true. *Purcell v. Sowler*, 1 C. P. D. 781, 2 C. P. D. 215. See, also, *Oggers, Libel & Slander* (4th Ed.) Append. B, and the authorities therein cited. Since the decision in this last case the law has been somewhat modified so far as respects official and other public meetings. But these statutes have been somewhat strictly construed, and even now a fair report is not always safe. *Ponsford v. Financial Times*, 16 T. L. R. 248.

The subject was quite freely discussed by Shaw, C. J., in *Barrows v. Bell*, *ubi supra*, and the following language was used (7 Gray, 313): "Whatever may be the rule as adopted and practiced on in England, we think that a somewhat larger liberty may be claimed in this country and in this commonwealth, both for the proceedings before all public bodies, and for the publication of those proceedings for the necessary information of the people. So many municipal, parochial and other public corporations, and so many large voluntary associations formed for almost every lawful purpose of benevolence, business or interest, are constantly holding meetings, in their nature public, and so usual is it that their proceedings are published for general use and information, that the law, to adapt itself to this necessary condition of society, must of necessity admit of these public proceedings, and a just and proper publication of them, as far as it can be done consistently with private rights. This view of the law of libel in Massachusetts is recognized, and to some extent sanctioned,

by the case of *Com. v. Clap*, 4 Mass. 163, 3 Am. Dec. 212, and many other cases." And it was held that the publication by a member of the Massachusetts Medical Society of a true account of the proceedings of that society in the expulsion of another member for a cause within its jurisdiction, and of the result of certain suits subsequently brought by him against the society and its members on account of such expulsion, is privileged.

The above language of the court, however liberal its construction, is not to be understood as applying to strictly private meetings. It applies at the most only to meetings public in their nature, or where the proceedings concern the public. In that case it was said that the charter of the Massachusetts Medical Society "invested the society, their members and licentiates, with large powers and privileges, in regulating the important public interest of the practice of medicine and surgery, enabled them to prescribe a course of studies, to examine candidates in regard to their qualifications for practice, and give letters testimonial to those who might be found duly qualified." It was also stated that it appeared by the acts incorporating this society that it was regarded by the Legislature "as a public institution, by the action of which the public would be deeply affected in one of its important public interests, the health of the people." It was further said that the proceedings of which the report was made "might be rightly characterized, as in the case of *Farnsworth v. Storrs*, 5 Cush. 412, as quasi judicial." And it was upon the latter ground that the communication was adjudged to be privileged.

The case before us is entirely different. The meeting was simply that of a private corporation invested with no privileges and owing no special duties to the public. It was an ordinary business meeting. Whether any member was in fraudulent possession of stock, or had mismanaged the affairs of the corporation, or whether the plaintiffs were unfit to continue as officers, or the corporation had been made bankrupt, were matters with which the public were in no way concerned. The meeting was for the stockholders alone. Only they or their duly constituted agents were entitled to be present. The meeting was neither public nor for a public purpose. As well might it be said that a private conference between the members of a partnership on partnership matters was a public meeting. For the purposes of the meeting it might have been necessary for charges to be made by one stockholder against another stockholder or an officer, and that the charges should be discussed and their truth or falsity determined; and so far the actors were well within the privilege. They had a duty to perform in a matter in which all were interested. But for ob-

vious reasons hereinbefore stated the mantle of protection cannot cover him who, having no interest, repeats the defamatory words to others also without interest. And in this matter the conductor of a newspaper stands no better than any other person. As was said in *Sheckell v. Jackson*, 10 Cush. 25, 26, 27, in reply to a contention that conductors of the public press are entitled to peculiar indulgence and have especial rights and privileges, "the law recognizes no such peculiar rights, privileges, or claims to indulgence. They have no rights but such as are common to all. They have just the same rights that the rest of the community have, and no more." These words, although spoken more than half a century ago, state the law as it exists to-day, except so far as it has been modified by statute, and there has been no statute material to the question before us. The result is that the articles were not privileged so far as they reported the proceedings of the corporation.

It is argued by the defendants that inasmuch as the charge in the bill in equity was the same as that made at the meeting, namely, that the majority of the stock was in the fraudulent possession of the plaintiffs, it will be impossible for the plaintiffs to contend that any alleged damage was suffered from the one rather than from the other, and therefore if one report is privileged the action cannot be maintained. This is untenable. Even if the charge in substance is the same, it is evident that a charge made in a bill in equity filed in court may not be regarded as so serious a matter as a charge made by one's business associates in a business meeting. The difficulty of separating the damages gives no immunity to the defendants.

Exceptions sustained.⁷⁷

GILMAN v. McCLATCHY.

(Supreme Court of California, 1896. 111 Cal. 606, 44 Pac. 241.)

The defendant's reporter gathered from one Stella Truitt and her friends the story of an alleged rape by the plaintiff, Gilman, upon Mrs. Truitt, giving many details. He wrote it up at once, but publication was withheld until a warrant was issued for the plaintiff upon Mrs. Truitt's sworn complaint. The warrant was issued at 3 p. m. and the story was published at 4 p. m. of the same day. In holding that the report was not privileged, the court per HENSHAW, J., said (111 Cal. 611, 44 Pac. 242):

"The publication is not, and does not purport to be, a report of a judicial, legislative, or other public official proceed-

⁷⁷ The decision is that judgment should have been for the plaintiff, for the reason that this was not a privileged report.

ing, or of anything said in the course thereof. It is no more nor less than its head lines represent 'A Damaging Tale against a Sacramento Merchant,' materials for which were gathered by the reporter, as the court found, partly from Mrs. Truitt, but principally and secondhand from the neighborhood friends and gossips."⁷⁸

E. FAIR COMMENT AND CRITICISM

Points Involved.—1. A. writes and publishes a book. B. reviews the book for a magazine or newspaper, ridiculing the literary style or conclusions of the author. A. sues B. (or the magazine, or the newspaper) for libel. What justification, if any, can the defendant offer?

2. Would the answer be the same, if A. had written a

⁷⁸ Accord: *McAllister v. Free Press Co.*, 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318 (1889): "And the reporter of a newspaper has no more right to collect the stories on the street, or even to gather information from policemen or magistrates out of court, about a citizen, and to his detriment, and publish such stories and information as facts in a newspaper, than has a person not connected with a newspaper to whisper from ear to ear the gossip and scandal of the street. If true, such publication or such speaking may be privileged; but if false, the newspaper as well as the citizen must be responsible to any one who is wronged and damaged thereby. It is indignity enough for an honest man to be arrested and put in prison for an offense of which he is innocent, and for which indignity oft-times he has no redress, without being further subjected to the wrong and outrage of a false publication of the circumstance of such arrest and imprisonment, looking towards his guilt, without remedy, and no sophistry of reasoning, and no excuse of the demand of the public for news, or of the peculiarity and magnitude of newspaper work, can avail to alter the law, except, perhaps, by positive statute, which is doubtful, so as to leave a party thus injured without any recompense for a wrong which can even now, as the law stands, never be adequately compensated to one who loves his reputation better than money."

Jastrzembski v. Marxhausen, 120 Mich. 677, 79 N. W. 935: "Reports made to police officers charging persons with crime are not privileged communications, and those who publish such reports do so at their peril." *McDermott v. Evening Journal Ass'n*, 43 N. J. Law, 488, 39 Am. Rep. 606; *Stuart v. Press Pub. Co.*, 83 App. Div. 467, 82 N. Y. Supp. 401. "The facts which the law permits to be published under the protection of this privilege are those which appear on the judicial proceeding itself." *Nunnally v. Press Pub. Co.*, 110 App. Div. 10, 96 N. Y. Supp. 1042; *Billet v. Times-Democrat Publishing Co.* (1902) 107 La. 751, 32 South. 21, 58 L. R. A. 62 (reports made by police and detective officers in books left for that purpose not privileged). But compare *Morasca v. Item Co.*, 126 La. 426, 52 South. 565, 30 L. R. A. (N. S.) 315; *Hulbert v. New Nonpareil Co.*, 111 Iowa, 490, 82 N. W. 928. See, also *Park's Ann. Code Ga.* § 4432: "A fair and honest report of the proceedings of legislative or judicial bodies, or of court

friendly, personal letter to X., and B. had obtained it, published it, and criticized the style of it?

3. A. writes a treatise on mathematics. B., in reviewing the book, condemns it and urges the public not to read it, because of A.'s immoral character. It is not true that A.'s character was bad, but B. honestly thought that it was. Can B. take advantage of the defense considered in this section?

4. A. delivers a lecture. The B. newspaper, in giving an account of the program, states that A. was awkward, his use of English abominable, and the content of his lecture childish. Is the paper responsible to A. in an action of libel? How would it affect the case if A. could prove that the article was published because, upon a former visit to that city, he had insulted the editor of the B. newspaper?

5. A. is a candidate for county treasurer. During the campaign, the B. newspaper, in discussing his candidacy, states (a) that A. is an uneducated farmer, and therefore incapable of filling the office in a satisfactory manner, and cartoons him in ridiculous attire, studying the multiplication table in preparation for the office, and (b) also states that, while A. was a resident of another state, he had been convicted of embezzlement. The statement under (a) that A. was uneducated was very much exaggerated. His education had been limited to the grammar grades. He was a farmer. The statement under (b) is false. The paper has acted in good faith throughout. Can A. succeed in an action of libel under the facts in either (a) or (b)?

1. The General Rule and the Reasons for It.—Matters of public concern are the legitimate subject of fair and honest comment and criticism.

Why? It is well said in a recent case that "the actor, the artist and the author submit their professional work to the public, and thereby appeal to the public for support and approval." Having made this appeal to the public, the person cannot complain that the public proceeds to pass judg-

proceedings, or a truthful report of information received from any arresting officer or police authorities, shall be deemed privileged communications."

ment, so long, at least, as it be honest and fair. Moreover, a good critic is a public benefactor. The services that he is able to render justify according him some privileges and immunities. "The critic does a great service to the public, who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting their time on trash." ⁷⁹

2. Limitations upon the Defense.—The well-recognized limitations upon this defense, stated in general terms, are: (1) The criticism must relate to a matter of public concern as against that which is purely private. (2) The criticism must be the honest opinion of the critic, and not prompted by personal malice. (3) The criticism must be directed against the public work, performance or conduct and not against the individual as such. (4) It is comment or expression of opinion, and not misstatement of fact, that is permitted.

3. The Subject-Matter.—The reasons for the allowance of fair comment and criticism suggest the limitations as to subject-matter. It must be confined to matters which are public in their nature. "Matters of public interest and concern are legitimate subjects of criticism." ⁸⁰ " * * * Comments, however severe in terms, may be published in a newspaper concerning anything which is made by its owner a subject of public exhibition. * * * " ⁸¹

Books offered to the public, pictures publicly exhibited, and plays publicly performed clearly come within the rule. Comment upon a published book of an author is allowable; comment upon his private letters would not be. The defense has been held also to include comment upon the proposed consolidation of several lines of railroad,⁸² the character of the construction of a public building, such as a city hall,⁸³ and even a private corporation, such as a life insur-

⁷⁹ Carr v. Hood, 1 Camp. 355, note, *infra*, p. 138.

⁸⁰ 17 Ruling Case Law, § 100.

⁸¹ 17 Ruling Case Law, § 100.

⁸² Crane v. Waters (C. C.) 10 Fed. 619, *infra*, p. 142.

⁸³ Beance v. Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446, and note.

ance company, on the ground that it lay claim to the confidence of the public and sought the possession of public funds.⁸⁴ The actions of a clergyman in the discharge of his duties in conducting the public functions of his calling⁸⁵ may be commented upon, but not his private life.⁸⁶

4. Honesty and Good Faith.—The criticism must represent the honest opinion of the critic and not be prompted by personal malice. Dishonesty in the critic would at once rob his work of all value to the public and thus remove the prop on which the privilege is based. Likewise, if the motive is personal, the “mind of the writer would not be that of a critic.” He is privileged to write for the public good, not to gratify his personal feeling.⁸⁷ “Proof of malice may take a criticism *prima facie* fair outside the right of fair comment, just as it takes a communication *prima facie* privileged outside the privilege.”⁸⁸

5. Fairness.—The use of the word “fair” is apt to prove misleading. It might seem to require that the criticism measure up to a standard of reasonableness. Generally, in the law, where conduct is required to be reasonable, the standard taken is that of the average reasonable man. That is not the test applied, however, in this branch of the law. The cases would seem rather to indicate that the ultimate inquiry is whether the critic himself is actuated by a spirit of fairness, and this brings one back to the requirement of honesty. The unfairness of the criticism, as determined by an external standard, can be considered, therefore, only as evidence in the attempt to decide whether the opinion expressed represented the critic’s honest views. “Every latitude must be given to opinion and to prejudice and then an ordinary set of men, with ordinary judgment, must say whether any fair man would have made such a comment; * * * mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the

⁸⁴ *Hahnemannian Life Ins. Co. v. Beebe*, 48 Ill. 87, 95 Am. Dec. 519.

⁸⁵ *Klos v. Zahorik*, 113 Iowa, 161, 84 N. W. 1046, 53 L. R. A. 235.

⁸⁶ *Russell v. Washington Post Co.*, 31 App. (D. C.) 277, 14 Ann. Cas. 820.

⁸⁷ *Merivale v. Carson*, L. R. 20 Q. B. 275.

⁸⁸ *Thomas v. Bradbury, Agnew & Co.*, [1906] 2 K. B. 627.

opinion may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this: Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said? * * *"⁸⁹

The use of ridicule is not legally taboo. "One writer, in exposing the follies and errors of another, may make use of ridicule, however poignant. Ridicule is often the fittest weapon that can be used for such a purpose."⁹⁰

6. Criticize the Work or Performance, Not the Individual.—The subject-matter of protected criticism, as indicated above, is that which is placed before the public. It is therefore the work of an author primarily, and not the person of the author. It is the picture of an artist, and not the artist as a man. But this does not prevent all references to the individual, even though it is a published book that is the subject of the comment. In the case of actors and lectures and candidates for office, the references are inevitably more or less personal. But the personal allusions must be incidental to and in connection with the discussion of the work. In *Carr v. Hood*⁹¹ the author of a book was cartooned, but the jury found that there was nothing "personally slanderous against the plaintiff, unconnected with the works he had given to the public." On the other hand, *Triggs v. Sun Printing & Publishing Association*⁹² is an illustration of a case where the critic traveled outside the work of Professor Triggs and made a personal attack upon him as an individual in his private life.⁹³

⁸⁹ *Merivale v. Carson*, L. R. 20 Q. B. 275.

⁹⁰ *Carr v. Hood*, 1 Camp. 355, note, *infra*, p. 138. See, also, notes in 28 L. R. A. 670, and 48 L. R. A. (N. S.) 1221.

⁹¹ *Infra*, p. 138.

⁹² 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326, *infra*, p. 154.

⁹³ See *Wood v. Boyle*, 177 Pa. 620, 35 Atl. 853, 55 Am. St. Rep. 747. The article was as follows:

"A. D. Wood (the manager of a pipe line company), the variously notorious young Napoleon of politics and pipe lines, will assemble his small brood at Warren this morning, and together vote on the proposition to turn over the Producers' Oil Company's real line to the refiners and exporters doing business as the fake United States Pipe Line, a concern that exists on paper and subsists on wind. Mr.

7. Comment versus Misstatement of Fact.—It is repeatedly said in the cases that it is comment or opinion, and not misstatement of fact, that is privileged as criticism. It is one thing to say that A., who is a candidate for public office, is a thief. It is a different thing to argue that one who is a thief is not qualified to hold public office, or even to argue, from facts and circumstances which are fully and accurately stated, that the candidate had been guilty of certain misconduct which would render him unsuitable for office. The former is a pure statement of fact; the latter is comment or opinion.

"It is not the law that a person may assail the character of a candidate for office by charging him with criminal misconduct, and then escape liability on the ground that the charge was made with good intentions and for justifiable ends, without malice, and under even an honest belief that the charge is true, and that the occasion of his candidacy called for its publication. While the privilege of electors to comment and criticize the acts and conduct of candidates for public places is very large, this privilege must be confined to statements of truth."⁹⁴

Wood has accomplished some surprising things in his day. Without a following in politics, he has set up a political boss; without brains or capital or credit, he has appeared at the head of a gigantic business enterprise requiring liberal bank balances and a large mental endowment. He never yet has succeeded in anything he has undertaken involving the peace and prosperity of the community, for the excellent reason that he is invariably associated with movements that ought not to succeed. We dare say that his scheme to steal a pipe line from the poor producers, in order to give it to the opulent refiners and arrogant exporters masquerading as the United States Pipe Line, will fail, as it properly should. It would seem that there is no limit to the greed of this fiend in corporate form, the insatiate monster called United States Pipe Line. Up in McKean county it has Billee Burdick, the boy statesman, running for Assembly, and if he is elected the refiners' and exporters' pipe line will have a personal representative in the Legislature. This is a good place to say much and saw Wood. Saw his official head off."

It was held that the imputations against the plaintiff were not against him as an official, but as an individual, and not to be protected as political criticism. The Court said: "It was not his official character, or the conduct of his official business, that was impeached. On the contrary, the publication was a coarse, brutal, malevolent, and purely personal attack upon the plaintiff in his private, individual, and personal capacity."

⁹⁴ Dauphiny v. Buhne, 153 Cal. 957, 96 Pac. 880, 126 Am. St. Rep. 136.

"To charge a man incorrectly with a disgraceful act is very different from commenting on a fact relating to him truly stated."⁹⁵

"What is privileged, if that is the proper term, is criticism, not statement. * * * What the interests of private citizens in public matters require is freedom of discussion rather than of statement."⁹⁶

The rule is easier to state than to apply. Drawing the line in the specific case is sometimes very difficult, and is fraught with uncertainty. This is because, in the very nature of things, the line between fact and opinion is shadowy. Some statements are readily recognized as statements of fact; others as statements of opinion. In between lie many cases where the interpretation is doubtful.

*Eikhoff v. Gilbert*⁹⁷ was a libel action based on the charge in a circular that the plaintiff, who was a candidate for re-election as representative, in the last Legislature had "championed measures opposed to the moral interests of the community." The Michigan court treated this as a statement of fact, rather than opinion, thus leaving the defendant with the defense of truth only. "The fault here," says the court, "is that opinions and inferences were not stated as such, but as facts. * * * They [the defendants] did not state what measures were supported, and their opinions of that particular conduct, but said generally and unqualifiedly, as a fact, that the plaintiff had arranged himself against the moral interests of the community, which, if true, should discredit him with any other voter who should believe the statement. * * * It afforded no one an opportunity to judge whether the statement was a proper deduction from the facts upon which it was based or not." This is better guidance than is ordinarily found in the decisions.

Repeated decisions have also made it clear that an attack upon the motives of a candidate for office, or public official,

⁹⁵ *Popham v. Pickburn*, 7 Hurl. & N. 891.

⁹⁶ *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97.

⁹⁷ 124 Mich. 353, 83 N. W. 110, 51 L. R. A. 451, *infra*, p. 172.

lies outside the field of criticism, and calls for proof of truth as a defense.⁹⁸

8. Defamatory Statements of Fact Concerning Candidates for Public Office.—Defamatory statements of fact concerning a candidate for public office must be justified, if at all, by proof of their truth, or by the law of conditional privilege. For the reasons given in the previous section, the principles of fair comment and criticism have no application. Whether such statements should be treated as privileged is itself a mooted question.

What, in general, is the scope of conditional privilege? We have already seen that reports of legislative and judicial proceedings are conditionally privileged. The brief presentation of other illustrations of conditional privilege will shed light on our present problem. If A. applies to X. for a position, and X. requests of Y., A.'s former employer, a statement concerning A.'s qualifications and character, Y.'s reply is conditionally privileged. If, in his reply, Y. states that A. stole money from him, he has a complete defense to an action of libel brought by A., provided he honestly and upon reasonable grounds believed that A. was guilty of the theft, and provided, further, that he was actuated by no feeling of ill will toward A. He need not prove that the statement was in fact true. Reports of commercial agencies, when the reports are requested, are governed by the same principles. Likewise one may claim conditional privilege if, in the attempt to safeguard his own personal or pecuniary interests, he makes, in good faith, a defamatory statement. For example, if one about to take passage on a train were, in good faith, to notify the master mechanic that the engineer was intoxicated, his statement would be treated as conditionally privileged. It will be noted that in all these cases the statement is made either *to* one who has an interest that would be safeguarded by the statement, if it were true, or *by* one who is seeking to safeguard his own interests, or where both the maker and the recipient of the

⁹⁸ *Hoey v. New York Times Co.*, 138 App. Div. 149, 122 N. Y. Supp. 978, *infra*, p. 164; *Hamilton v. Eno*, 81 N. Y. 116.

statement have interests to be protected. They are not cases of idle gossip.

If, then, a newspaper, through its columns, makes a defamatory statement of fact to the voters concerning a candidate for public office, who is appealing to the popular vote for election, it is obvious that the statement is made by one who has a legitimate interest to protect, to those who have a similar interest to be protected. If no other considerations entered, it would seem quite inevitable that the occasion should be declared conditionally privileged. But there are numerous authorities which take the position that the newspaper should have no defense, other than truth. Indeed, by the great weight of authority, truth is the only defense in such cases. A leading opinion championing this view is that by Judge Taft in *Post Publishing Company v. Hallam*.⁹⁹ The learned Judge argues that, because of the broadcasting of charges against candidates for office, the sacrifice of the individual right in cases of falsity outweighs the public good to be derived from lifting the restrictions which the requirements of truth impose. It is also contended by another supporter of this view that any encouragement given to mud-slinging in political campaigns tends to deter reputable candidates from entering the lists.

The reasons for treating defamatory statements of fact concerning candidates for public office as conditionally privileged are fully and ably set forth in *Coleman v. MacLennan*.¹ The answer given by the Kansas court to the argument that this relaxation of the strict rule would make it difficult, if not impossible, to induce good men to run for office, is that experience in Kansas has proved it untrue. The Kansas rule, though in the minority, has substantial following. The effect of this rule is to enable the disseminator of such defamation to escape liability, if he acted in good faith and had reasonable grounds for believing his charges to be true, as in the case where one gives a character to a servant.

⁹⁹ 59 Fed. 540, 8 C. C. A. 201, Judge Taft's opinion is quoted at length and relied upon in *Starr Publishing Co. v. Donahoe*, *infra*, p. 180.

¹ *Infra*, p. 193.

Which view should finally prevail depends entirely upon what is sound public policy. There is force in the arguments both pro and con.²

In the case of those who are in public office, and not candidates for office, the rules of privilege, logically applied, would require that the charges be lodged with the authority having the legal power of removal, and not heralded through the press. Presenting them through the newspaper involves greater publicity than is required to obtain the desired result. Even in states like Kansas, therefore, the privilege would be limited to charges against candidates, where wide publicity would be required to reach the electorate.

CARR v. HOOD.

(Nisi Prius, 1808. 1 Camp. 354, note.)

The declaration stated that the plaintiff, before the publishing of any of the false, scandalous, malicious, and defamatory libels thereafter mentioned, was the author of, and had sold for divers large sums of money, the respective copyrights of divers books of him, the said Sir John, to wit, a certain book entitled "The Stranger in France," a certain other book entitled "A Northern Summer," a certain other book, entitled "The Stranger in Ireland," etc., which said books had been respectively published in 4to, yet that defendant, intending to expose him to, and to bring upon him, great contempt, laughter, and ridicule, falsely and maliciously published a certain false, scandalous, malicious, and defamatory libel, in the form of a book, of and concerning the said Sir John, and of and concerning the said books, of which the said Sir John was the author as aforesaid, which same libel was entitled, "My Pocket Book, or Hints for a Ryghte Merrie and Conceited Tour, in quarto, to be called The Stranger in Ireland in 1805 (thereby alluding to the said book of the said Sir John, thirdly above mentioned), by a knight errant (thereby alluding to the said Sir John)," and which same libel contained therein a certain false, scandalous, malicious, and defamatory print, of and concerning the said Sir John, and of and concerning the said books of the said Sir John, first and secondly above mentioned, there-

² For specific references to the authorities in the various jurisdictions, see *Starr Pub. Co. v. Donahoe* and *Coleman v. MacLennan*, and the notes thereto, *infra*, pp. 180, 193.

in called "Frontispiece," and entitled "The Knight (meaning the said Sir John) Leaving Ireland with Regret," and containing and representing in the said print a certain false, scandalous and malicious, defamatory and ridiculous representation of the said Sir John, in the form of a man of ludicrous and ridiculous appearance, holding a pocket handkerchief to his face, and appearing to be weeping, and also containing therein a certain false, malicious, and ridiculous representation of a man of ludicrous and ridiculous appearance, following the said representation of the said Sir John, and representing a man loaded with, and bending under the weight of three large books, one of them having the word "Baltic" printed on the back thereof, etc., and a pocket handkerchief appearing to be held in one of the hands of the said representation of a man, and the corners thereof appearing to be held or tied together, as if containing something therein, with the printed word "Wardrobe," depending therefrom (thereby falsely, scandalously, and maliciously meaning and intending to represent, for the purpose of rendering the said Sir John ridiculous, and exposing him to laughter, ridicule, and contempt, that one copy of the said first mentioned book of the said Sir John, and two copies of the said book of the said Sir John secondly above mentioned, were so heavy as to cause a man to bend under the weight thereof, and that his, (the said Sir John's, wardrobe was very small, and capable of being contained in a pocket handkerchief), and which said libel also contained, etc. The declaration concluded by laying, as special damage, that the said Sir John had been prevented and hindered from selling to Sir Richard Phillips, Knt., for a large sum of money, to wit, £600, the copyright of a certain book or work of him, the said Sir John, of which the said Sir John was the author, containing an account of a tour of him, the said Sir John, through part of Scotland, which, but for the publishing of the said false, scandalous, malicious, and defamatory libels, he, the said Sir John, would, could, and might have sold to the said Sir Richard Phillips for the said last mentioned sum of money, and the same remained wholly unsold and undisposed of, and was greatly depreciated and lessened in value to the said Sir John. Plea, not guilty.

LORD ELLENBOROUGH, as the trial was proceeding, intimated an opinion that, if the book published by the defendant only ridiculed the plaintiff as an author, the action could not be maintained.

GARROW [attorney], for the plaintiff, allowed that, when his client came forward as an author, he subjected himself to the criticism of all who might be disposed to discuss the merits of his works; but that criticism must be fair and liberal. Its ob-

ject ought to be to enlighten the public, and to guard them against the supposed bad tendency of a particular publication presented to them, not to wound the feelings and to ruin the prospects of an individual. If ridicule was employed, it should have some bounds. While a liberty was granted of analyzing literary productions, and pointing out their defects, still he must be considered as a libeler, whose only object was to hold up an author to the laughter and contempt of mankind. A man with a wen upon his neck perhaps could not complain if a surgeon in a scientific work should minutely describe it, and consider its nature and the means of dispersing it; but surely he might support an action for damages against any one who should publish a book to make him ridiculous on account of this infirmity, with a caricature print as a frontispiece. The object of the book published by the defendants clearly was, by means of immoderate ridicule, to prevent the sale of the plaintiff's works, and entirely to destroy him as an author. In the late case of *Tabart v. Tipper*, his lordship had held that a publication by no means so offensive or prejudicial to the object of it, was libelous and actionable.

LORD ELLENBOROUGH. In that case the defendant had falsely accused the plaintiff of publishing what he had never published. Here the supposed libel has only attacked those works of which Sir John Carr is the avowed author; and one writer, in exposing the follies and errors of another, may make use of ridicule, however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interests of the person ridiculed suffer, it is *damnum absque injuria*.³ Where is the liberty of the press, if an action can be maintained on such principles? Perhaps the plaintiff's *Tour through Scotland* is now unsaleable; but is he to be indemnified by receiving a compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his compositions? Who would have bought the works of Sir Robert Filmer after he had been refuted by Mr. Locke? but shall it be said that he might have sustained an action for defamation against that great philosopher, who was laboring to enlighten and ameliorate mankind? We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise the first who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. Reflection on personal character is another thing. Show me an attack on the moral char-

³ A loss which one must bear without legal redress.

acter of this plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule.

The counsel for the plaintiff still complaining of the unfairness of this publication, and particularly of the print affixed to it, the trial proceeded.

The Attorney General having addressed the jury on behalf of the defendants—

LORD ELLENBOROUGH said: Every man who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. In the present case, had the party writing the criticism followed the plaintiff into domestic life for the purpose of slander, that would have been libelous; but no passage of this sort has been produced; and even the caricature does not affect the plaintiff, except as the author of the book which is ridiculed. The works of this gentleman may be, for aught I know, very valuable; but whatever their merits, others have a right to pass their judgment upon them—to censure them if they be censurable, and to turn them into ridicule if they be ridiculous. The critic does a great service to the public, who writes down any vapid or useless publication such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash. I speak of fair and candid criticism; and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider as an injury; because it is a loss which the party ought to sustain. It is in short the loss of fame and profits to which he was never entitled. Nothing can be conceived more threatening to the liberty of the press than the species of action before the court. We ought to resist an attempt against free and liberal criticism at the threshold. The Chief Justice concluded by directing the jury that, if the writer of the publication complained of had not traveled out of the work he criticised for the purpose of slander, the action would not lie; but if they could discover in it anything personally slanderous against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action, and they would award him damages accordingly.

Verdict for the defendants.⁴

⁴ "It is clear that, when an artist submits his work to the public, such work is the subject of criticism, and that no one is answerable for fair comment or criticism thereon. The actor, the artist, and

CRANE v. WATERS et al.

(Circuit Court of the United States, 1882. 10 Fed. 619.)

Action of tort for libel. On demurrer.

The defendants published in their newspaper, the Boston Daily Advertiser, an article concerning an attempt of Edward Crane, the plaintiff, to procure the election of directors of the New York & New England Railroad Company at the then recent annual meeting. The article was entitled "History Repeated," and purported to give a narrative of the dealings of the plaintiff with the Boston, Hartford & Erie Railroad Company by which he had brought it to bankruptcy, and to give the impression that he intended to act in a similar way with the New York & New England, which was a corporation formed by the bondholders of the other road. The project attributed to the plaintiff included the buying up of certain railroads in Connecticut, consolidating them with the New York & New England Company, etc. It alleged that the plaintiff's schemes were exposed by skilful questioning at the meeting, and that he had retired discomfited.

The plaintiff, in his declaration, set out this article in full, and in the first count alleged damage generally; in the second that he was a manager and constructor of railroads, and was engaged in a business undertaking to make a through line between Boston and New York by the purchase and construction of railroads, and that the New York & New England Railroad was to be a part of the line; but, by the publication of the libel, he lost the support of some of his associates, and of stockholders of that road, and suffered special damage.

The defendants answered—First, that the statements made in the article were true; second, that the railroad concerning which the article was written was a public work of great importance to the commonwealth and people of Massachusetts, and in which the commonwealth was a large stockholder; that the other stockholders were numerous, and could

the author submit their professional work to the public, and thereby appeal to the public for support and approval. They must accept with equal equanimity praise and blame, so long as the comment is directed at the work itself." *Outcault v. New York Herald Co.*, 117 App. Div. 534, 102 N. Y. Supp. 685, 686.

Statutes.—Code N. M. 1915, § 1727: "It is no offense [i. e., not a crime] to publish any criticism or examination of any work of literature, science or art, or any opinion as to the qualifications or merits of the author of such work." Penal Law N. Y. (Consol. Laws, c. 40) § 1342: "The publication [of a libel] is excused when it is honestly made, in the belief of its truth and upon reasonable grounds for this belief, and consists of fair comments upon the conduct of a person in respect of public affairs, or upon a thing which the proprietor thereof offers or explains to the public."

only be reached through the press; that the effort of the plaintiff to obtain control of the railroad was a matter in which the public were interested, and was a proper subject of discussion in the newspapers; and that the defendants, believing that such control would be a public misfortune, and would be a serious injury to the railroad and to the public, discussed the plaintiff's plans, and qualifications in good faith, and without malice; and that they made only such statements and reflections as they believed, on due inquiry and reasonable grounds, to be true and just, and warranted by the plaintiff's acts. To this second part of the answer the plaintiff demurred.⁵

LOWELL, C. J. For the purpose of deciding this demurrer it must be assumed that the plaintiff had conceived and begun to carry out a plan for making a railroad from Boston to New York by the consolidation of certain shorter lines, and otherwise, and that it was a part of his plan to obtain control of the New York & New England Company by electing directors favorable to his scheme; that the publication of the article complained of interfered with this plan to his prejudice; and that the statements of the article were not true, but were published in good faith, without express malice, and were, upon reasonable inquiry by the defendants, believed by them to be true.

The contention then is, on the part of the defendants, that the subject-matter is one in which the public has an interest, and that in discussing a subject of that sort a public speaker or writer is not bound at his peril to see that his statements are true, but has a qualified privilege, as it has been called, in respect to such matters.

The modern doctrine, as shown by the cases cited for the defendants, appears to be that the public has a right to discuss in good faith, the public conduct and qualifications of a public man, such as a judge, an ambassador, etc., with more freedom than they can take with a private matter, or with the private conduct of any one. In such discussions they are not held to prove the exact truth of their statements, and the soundness of their inferences, provided that they are not actuated by express malice, and that there is reasonable ground for their statements or inferences, all of which is for the jury. *Kelly v. Sherlock*, L. R. 1 Q. B. 686; *Kelly v. Tinling*, Id. 699; *Morrison v. Belcher*, 3 F. & F. 614; *Henwood v. Harrison*, L. R. 7 C. P. 606; *Davis v. Duncan*, L. R. 9 C. P. 396; *Gott v. Pulsifer*, 122 Mass. 235.

Some of the affairs of a railroad company are public and

⁵ The question was thus raised as to whether such facts constitute a justification or excuse.

some are private. For instance, the honesty of a clerk or servant in the office of the company is a matter for the clerk and the company only. The safety of a bridge on the line is a subject of public moment. The public, in this sense, is a number of persons who are or will be interested, and yet who are at present unascertainable. All the future passengers on the road are the public, in respect to the safety of the bridge, and as they cannot be pointed out, you may discuss the construction of the bridge in public, though you thereby reflect upon the character of the builder. If this definition of the public is a sound one, the commonwealth, considered as a stockholder, is not the public, for its interests are intrusted to certain officers, who are easily ascertained; nor would the interests of the shareholders become a public matter merely by reason of their number, unless it were proved that it would be virtually impossible to reach them individually. If, therefore, the question were merely of the effect of the scheme upon the shares of the New York & New England Railroad Company, a corporation already chartered and organized, I should doubt somewhat whether it would be of a public nature. But, inasmuch as the project was one which affected a long line of road, as yet only partly built, and the consolidation of several companies, it assumes public importance.

Perhaps the right of legislative interference may be taken as a fair test of the right of public discussion, since they both depend upon the same condition. The Legislature cannot interfere in the purely private affairs of a company, but it may control such of them as affect the public. It cannot be doubted, I apprehend, that the Legislatures of Connecticut and Massachusetts would have power to permit or to prohibit or to modify a scheme such as is now in question. It interests the public, consisting of the unascertained persons who will be asked to take shares in it, and those through whose land it will pass or whose business will be helped or hindered by it, that such a line should be well, and even that it should be honestly, laid out, built, and carried through. For this reason the character of the plaintiff, as a constructor and manager of railroads, seems to me to be open to public discussion when he comes forward with so great and important a project affecting many interests besides those of the shareholders of one road; and that, therefore, the defendants, or any other persons, have the qualified privilege which attaches to discussions of public affairs. The distinction is this: that when a railroad is to be built, or a company to build it is to be chartered, the question whether it shall be authorized is a public one; when the company is organized

and the stock is issued, anything which merely affects the value of the stock is private.

Demurrer to the answer overruled.⁶

CLEVELAND LEADER PRINTING CO. v. NETHERSOLE.

(Supreme Court of Ohio, 1911. 84 Ohio, 118, 95 N. E. 735, Ann. Cas. 1912B, 978.)

This action is brought by Olga Nethersole, against the Cleveland Leader Printing Company for libel. The plaintiff below is an actress and a producer of plays upon the stage; the defendant below is the publisher of a daily newspaper called the Cleveland Leader, published in the city of Cleveland and of extensive circulation in that city and throughout surrounding territory. The alleged libel was published in the Sunday edition of the paper of date March 25, 1906. During the preceding week Miss Nethersole had produced in the opera house in Cleveland four plays known respectively as "Camille," "Carmen," "The Labyrinth," and "Sappho," appearing herself in one of the leading parts in each. A theatrical critic, after setting forth an interview with an eminent evangelist, purporting to condemn the stage, both because of the immorality of the players and the plays, proceeds to express his own views as follows:

"There is food for thought in much that Dr. Torrey says. Indeed, if I am not mistaken, much of the criticism he makes has been in our minds also, and no one can accuse us of

⁶ The decision is for the defendant, it being held that the published article related to a matter of public, and not of mere private, interest. See, also, *Willis v. O'Connell* (D. C.) 231 Fed. 1004, 1016 (efficacy of widely advertised patent medicine, held to be the subject of fair comment); *Flanagan v. Nicholson* Pub. Co. 137 La. 588, 68 South. 964, L. R. A. 1917B, 510, Ann. Cas. 1917B, 402 (holding that the plaintiff, a resident of New Orleans, by lobbying in Washington against New Orleans and in favor of San Francisco over the location of the Panama Exposition, made himself a "public figure and subject to such attack, condemnation, and ridicule as is appropriate and necessary in a campaign where public opinion is sought to be molded"); *Press Co. v. Stewart*, 119 Pa. 584, 14 Atl. 51 (plaintiff held himself out as head of a school for clerks, salesmen, and reporters); *Brown v. Providence Telegram Pub. Co.*, 25 R. I. 117, 54 Atl. 1061 (approving and showing basis of right to comment on judges, juries, and court decisions). But compare *Morse v. Times-Republican Printing Co.*, 124 Iowa, 707, 100 N. W. 867 (plaintiff engaged in business as an insurance agent, not the subject of comment); *Rood v. Dutcher*, 23 S. D. 70, 120 N. W. 772, 20 Ann. Cas. 480 (physician advertising as specialist, not the subject of comment).

antagonism to the stage. In fact, our love for it makes us its sternest critics at times.

"We can pass over without much comment his remarks on the unwholesome atmosphere of the stage and its pernicious effects on the youthful mind. All it needs is the qualification 'sometimes.' One of those times was last week, when the whole Nethersolian repertory failed to provide a helpful situation or one that was not tarred with suggestiveness. All the plays left nasty tastes in the memory. As I recall them, 'The Labyrinth' was the worst of the lot. Cleveland received it frigidly, as is the American way when displeased or disgusted, but when it was produced in London it was hissed so soundly that Miss Nethersole had hysterics.

"We can guard against these brazen, fleshly plays, however. The honest-minded writer about the stage will point out their dangers. The greater evil lies in the subtle undermining of the character which follows upon laughing attacks made upon domestic life. * * *

"The danger of such plays lies in the way that the audience receives them quite as much as that in which they are presented. The complications are always so humorous that they convulse the auditor. And when you laugh at an evil you condone it. * * *"

The plaintiff's petition contained apt innuendoes and averments common to petitions in libel respecting the falseness of the article, of its libelous character, of malice on the part of the publisher in publishing it; that it has caused plaintiff great mental distress, and she has been greatly damaged in her good name, and brought into public shame; and that her business as manageress and actress has been injured, and she has sustained great loss thereby. The answer contained denials of these averments and alleged that the publication was made in defendant's capacity as a public journalist, that the same was a fair, impartial criticism, and that the publication was privileged. The petition also contained an averment of special damage; but the evidence of plaintiff failed to support that claim. Hence the question was, and was stated by the trial judge to be, whether or not the article contained words which of themselves are actionable per se, and would warrant a verdict for plaintiff without proof of special damage.

Counsel for defendant contended for the negative of this proposition, and, standing on that claim, presented at the conclusion of all the evidence a motion asking the court to arrest the case from the jury and direct a verdict for the defendant; which motion was overruled. Proceeding thereupon to instruct the jury, the court eliminated from their con-

sideration as respecting words libelous per se all of the article save that part which related to the play called "The Labyrinth," and with respect to that part charged the jury as follows: "I therefore say to you that the publication to the effect that the production of 'The Labyrinth,' as presented by Miss Nethersole in Cleveland, was received frigidly, and when it was produced in London, it was hissed so soundly that Miss Nethersole had hysterics, must be deemed to be libelous as affecting the plaintiff in her business and profession, and she is entitled to recover a verdict in this case." A verdict for plaintiff in the sum of \$2,500 followed, and judgment was rendered thereon. On error in the circuit court that judgment was affirmed. The printing company asks a reversal of both judgments.

SPEAR, C. J.⁷ Manifestly the crucial question in the case is whether or not the comment respecting the play called "The Labyrinth," connected with the statement that Miss Nethersole "had hysterics," was libelous per se. One assumption in support of the affirmative of this question is that the article was directed against the plaintiff below, while the contrary claim is that it was directed against the play—the thing itself. Was it directed against the plaintiff? The article is entirely free from anything like a libelous attack upon Miss Nethersole. True, she is referred to, and it is stated that she had hysterics. That a woman has fainted, or has had hysterics, is so common an occurrence that a statement to that effect, though untrue (and the legal effect of the record is that it was in this case untrue), falls far short of being a libel per se upon such woman, and, leaving that reference to the plaintiff out, the statement is at once but a statement that the play was soundly hissed in London, which was also untrue. As tersely stated by counsel for defendant below: "It" (the article) "has no reference whatever to Miss Nethersole; it does not say that she is not qualified for her profession; it does not say that Miss Nethersole was received frigidly in Cleveland; it does not say that Miss Nethersole was hissed in London. It says that the play 'The Labyrinth' was received frigidly in Cleveland; it says that the play 'The Labyrinth' was hissed in London." Besides, the record shows that Miss Nethersole was not charged with any lack of character or of womanliness as a woman; and the court as we understand it found as a fact that there was no charge or imputation against her as a woman.

It is, however, claimed that the alleged libel was against her in her profession or business. Here, again, the record

⁷ The statement of facts is abridged and part of the opinion is omitted.

contradicts the claim. She was not charged with any lack of ability or character as an actress, nor with any lack of ability or of good judgment as a manager; indeed, no reference whatever to her conduct or management in either respect was had, the court having distinctly so found and held. The case, therefore, presented a situation where the evidence afforded no ground for an allegation of actual malice, and no ground for a claim that the plaintiff had, by reason of the publication, been subjected to public disgrace, contempt, or ridicule, and where the only part of the article which was found to be libelous *per se* could not be considered as evidence of express malice in respect to criticisms otherwise not unfair or unreasonable. The learned judge held that the balance of the article was not of itself unfair, or unreasonable, and therefore not libelous.

How, then, could the article be treated as a libel upon Miss Nethersole? It is alleged that by reason of this article she has suffered mental distress. Quite likely. But is that a test of whether the article is against her rather than exclusively against the plays? No person, man or woman, can witness sharp criticism of his or her own production, play, book, song, or what-not, without more or less mental discomfort, and possibly, in a remote way, some trivial loss. Take a familiar event as an example. Recently there appeared before the American public, on the lecture platform, and in other public places perhaps, a somewhat noted navigator offering certain proofs of his claim that he had discovered the north pole. Newspapers and scientific journals commented severely upon the proofs, seeking to show that they were bogus. Undoubtedly the navigator felt much distress, and it is quite likely that many people thought less of him because of those attacks; but does that afford any reason for saying that the attack was upon the man? And although the writer of such criticism had, in some nonessential particular, been mistaken as to a fact, would that show that the attack was on the navigator rather than on the proofs, and give an action as upon a libel *per se*? It would seem not. And is fair criticism of proofs of an exhibition to be penalized because it may cause some distress or even loss of profits to the exhibitor, especially, where the amount of such loss might thereby be saved to the public?

Although the distinction between a libel upon a person and a libel upon that which is the property of a person is somewhat nice, and although in many cases the distinction is not easy to demonstrate, it often being difficult to apply the settled rules of law to the particular facts of the case, and although the decisions illustrating the subject are not altogether

er consistent, one with another, yet the rule seems to be well established to the effect that while by the law of libel defamatory language is actionable without special damage when it contains a damaging imputation against one as an individual, or in respect to his office, profession, or trade, it is not actionable when it is merely in disparagement of one's property unless it occasions special damage. * * *

This opinion makes clear the narrow margin of support there is for any recovery of damages in the case. It rests wholly on the theory that if any possible damage, however remote or slight, can be imagined as coming to the owner of property by a libel upon such property, a case is made for an inquiry of damages generally by the jury, though no special damage be alleged or proven, and although the published words do not, as found by the trial court, naturally tend to expose the person concerning whose property the same were published, to public hatred, contempt, or ridicule, or deprive her of the benefits of public confidence or social intercourse—a conclusion which utterly obliterates and destroys the distinction as affecting the establishment of damages between a libel upon the person and a libel upon the property of such person, while, at the same time, it allows nothing by way of privilege or duty to the public.

Upon the question of actual malice, the record shows that the gentleman who was the editor of the paper and was vice president of the company, on the stand testified to the effect that no malice existed on the part of defendant, showing that neither he nor the others of the managers had any ill will toward the plaintiff, nor did the witness know of that article before it was published. The dramatic critic, upon the stand, disclaimed any ill will toward the plaintiff and any intent to injure her. He testified, also, that, when he wrote the article, that relating to "The Labyrinth" as well as the other parts, he believed all to be true; that he had been told of the London incident by a man connected with the stage, and had also seen a dispatch, or cable, from London telling of the same incident. No evidence was offered in contradiction of this testimony, or to establish otherwise the charge of actual malice, and the conclusion is justified that the accusation as to actual malice failed.

We suppose the rule to be well established that, while malice is implied if the publication be per se libelous, yet, if not, and malice is alleged, the charge must be supported by evidence. We have therefore a case where there is a published criticism of that which is the property of a person, without the presence of actual malice, and without proof of special damage. By force of the authorities, and upon reason, we

hold that such a case presents no ground justifying a verdict in damages. To hold otherwise would be to ignore the rule respecting libels against property shown by a long line of decisions, a few only of which have been heretofore cited.

Counsel argue that the plaintiff below was entitled to special consideration because she is a woman, and cite the chivalrous language of Read, J., in *Malone v. Stewart*, 15 Ohio, 321, 45 Am. Dec. 577. That language was manly and appropriate in that kind of a case (which involved a gross slander upon a woman); but we think is out of place as applied to this case. Of course, the plaintiff below had the same right to considerate and decorous treatment as a man in a like situation would have had and a just and reasonable award of damages if any special damage had been proven; but, the matter being strictly a business enterprise, she could have no superior right. The case was given to the jury in a way to permit them, with no proof of special damage, and almost without guide as to any damage, to wander at will and return such sum as imagination might conjure up, and the amount of the verdict itself, which was criticised by the trial judge himself as to amount, shows a lamentable want of comprehension of the real case submitted. It is a pregnant and significant instance of the great risk of giving to juries unlimited range in contentions of this kind. Remembering, however, that the plaintiff was present at the trial, and on the stand as a witness, it is not any wonder that, giving way to the charm of a talented and captivating woman, the jury inclined to reach into the till of what they doubtless considered "a soulless corporation," and return a sum one-fifth of which would have been thought adequate had the complaining party been a man.

It is no answer to say that newspapers often exceed the bounds of fairness and decency in comments upon people and their private affairs. Every intelligent reader knows that some papers do, and cause great distress and wrong thereby, but others are scrupulous and careful. Nor can it be denied that the press owes a duty to its readers in regard to its notices of the theater and plays therein presented. The theater is, in a sense, a public institution; that is, it is a place to which the public at large is invited, subject to such regulations as the manager may see fit to adopt. As yet the press has not been generally excluded, and, while its representatives are permitted to be present and essay notice and criticism of the performances there witnessed, it is not only their privilege but their duty to give truthful accounts, commendatory when justified, deprecatory if required, and, while such criticisms are fair and substantially correct, the newspaper

is not only not blameworthy, but is thereby rendering a valuable service to the public. It will be a sorry day when it becomes a perilous thing for a newspaper to justly characterize as demoralizing many of the plays nightly presented on the boards of our theaters at this time, and it is the duty of the courts to see that the rules of law are not so applied as to discourage just and truthful criticism. * * *

We are of opinion that the motion of the defendant below, at the conclusion of all the evidence, to take the case from the jury and render judgment for the defendant, should have been sustained, and that it is the duty of this court now to render the judgment that the common pleas should have rendered. Judgment of the circuit court and of the common pleas will be reversed, and judgment will be entered for the plaintiff in error [defendant in the trial court].

Reversed.

DAVIS, PRICE, JOHNSON, and DONAHUE, JJ., concur.

CHERRY v. DES MOINES LEADER et al.

(Supreme Court of Iowa, 1901. 114 Iowa, 298, 86 N. W. 323, 54 L. R. A. 855, 89 Am. St. Rep. 365.)

DEEMER, J.⁸ The action is predicated on the publication of the following article: "Billy Hamilton, of the Odebolt Chronicle, gives the Cherry Sisters the following graphic write-up on their late appearance in his town: 'Effie is an old jade of 50 summers, Jessie a frisky filly of 40, and Addie, the flower of the family, a capering monstrosity of 35. Their long skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds like the wailings of damned souls issued therefrom. They pranced around the stage with a motion that suggested a cross between the danse du ventre and fox trot—strange creatures with painted faces and hideous mien. Effie is spavined, Addie is stringhalt, and Jessie, the only one who showed her stockings, has legs with calves as classic in their outlines as the curves of a broom handle.' " The defendants pleaded that plaintiff, with her sisters, were engaged in giving public performances, holding themselves out to the public as singers, dancers, reciters, and comedians; that their performances were coarse and farcical, wholly without merit, and ridiculous; that the Des Moines Leader is a newspaper published in the city of Des Moines, which the other defendants

⁸ Part of the opinion is omitted.

were conducting, and that the article appeared as a criticism of the performance given by plaintiff, and to expose the character of the entertainment; that it was written in a facetious and satirical style, and without malice or ill will towards plaintiff or her sisters. This is clearly a plea of privilege, and the direction to the jury to return a verdict for defendants was, no doubt, on the theory that the plea of privilege was established. That it was published of and concerning plaintiff in her rôle as a public performer scarcely admits of a doubt, and it is well settled that the editor of a newspaper has the right to freely criticise any and every kind of public performance, provided that in so doing he is not actuated by malice. In other words, the article was qualifiedly privileged. * * *

When the occasion is privileged the presumption arises that the publication was bona fide and without malice, and it is incumbent on plaintiff to overcome this presumption. If, from defendant's point of view, strong words seemed to be justified, he is not to be held liable, unless the court can say that what he published was to some extent, at least, inconsistent with the theory of good faith. These rules are well settled, and need no citation of authorities in their support. One who goes upon the stage to exhibit himself to the public, or who gives any kind of a performance to which the public is invited, may be freely criticised. He may be held up to ridicule, and entire freedom of expression is guaranteed dramatic critics, provided they are not actuated by malice or evil purpose in what they write. Fitting strictures, sarcasm, or ridicule, even, may be used, if based on facts, without liability, in the absence of malice or wicked purpose.⁹ The comments, however, must be based on truth, or on what in good faith and upon probable cause is believed to be true, and the matter must be pertinent to the conduct that is made the subject of criticism.

Freedom of discussion is guaranteed by our fundamental law and a long line of judicial decisions. As said in the *Gott Case*, supra [*Gott v. Pulsifer*, 122 Mass. 238], the editor of a newspaper has the right, if not the duty, of publishing, for the in-

⁹ "Comment distorted by malice cannot, in my opinion, be fair on the part of the person who makes it." *Thomas v. Bradbury, Agnew & Co.*, [1906] 2 K. B. 627 (Court of Appeal). See, also, *Merivale v. Carson*, L. R. 20 Q. B. D. 275 (1887), where the court says: "It is said that if, in some other case, the alleged libel would not be beyond the limits of fair criticism, and it could be shown that the defendant was not really criticizing the work, but was writing with an indirect and dishonest intention to injure the plaintiffs, still the motive would not make the criticism a libel. I am inclined to think that it would, and for this reason: That the comment would not then really be a criticism of the work. The mind of the writer would not be that of a critic, but he would be actuated by an intention to injure the author."

formation of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications, for which no action will lie without proof of actual malice. See, also, *Eastwood v. Holmes*, 1 Fost. & F. 347; *Paris v. Levy*, 9 C. B. (N. S.) 342; *Donaghue v. Gaffy*, 53 Conn. 43, 2 Atl. 397; *Carr v. Hood*, 1 Camp. 355, note. Surely, if one makes himself ridiculous in his public performances, he may be ridiculed by those whose duty or right it is to inform the public regarding the character of the performance. *Cooper v. Stone*, 24 Wend. 434. Mere exaggeration, or even gross exaggeration, does not of itself make the comment unfair. It has been held no libel for one newspaper to say of another, "The most vulgar, ignorant, and scurrilous journal ever published in Great Britain." *Heriot v. Stuart*, 1 Esp. 437. A public performance may be discussed with the fullest freedom, and may be subject to hostile criticism and hostile animadversions, provided the writer does not do it as a means of promulgating slanderous and malicious accusations. *O'Connor v. Sill*, 60 Mich. 175, 27 N. W. 13; *Davis v. Duncan*, L. R. 9 C. P. 396.

Ridicule is often the strongest weapon in the hands of a public writer; and, if it be fairly used, the presumption of malice which would otherwise arise is rebutted, and it becomes necessary to introduce evidence of actual malice, or of some indirect motive or wish to gratify private spite. There is a manifest distinction between matters of fact and comment on or criticism of undisputed facts or conduct. Unless this be true liberty of speech and of the press guaranteed by the constitution is nothing more than a name. If there ever was a case justifying ridicule and sarcasm,—aye, even gross exaggeration,—it is the one now before us. According to the record, the performance given by the plaintiff and the company of which she was a member was not only childish, but ridiculous in the extreme. A dramatic critic should be allowed considerable license in such a case. The public should be informed as to the character of the entertainment, and, in the absence of proof of actual malice, the publication should be held privileged. There is another rule of general application, now well known to the profession, that is involved, and that is that a motion to direct a verdict should be sustained, when it clearly appears to the trial judge that it would be his duty to set aside a verdict in favor of the party on whom the burden of proof rests. *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235.

Viewing the evidence in the light of the rules heretofore announced, and remembering that the trial court had the plaintiff

before it and saw her repeat some of the performances given by her on the stage, we are of opinion that there was no error in directing a verdict for the defendants.

Affirmed.

TRIGGS v. SUN PRINTING & PUBLISHING ASS'N.

(Court of Appeals of New York, 1904. 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326.)

Action for libel. Three libelous articles were complained of. The first was published March 2, 1903, and was as follows:

"Triggs in Altruria. Prof. Oscar Lovell Triggs (meaning this plaintiff), of the University of Chicago, is the brightest jewel in Dr. Harper's crown. Who doesn't know and venerate Triggs? Triggs (meaning this plaintiff), the hammer of hymn writers (meaning this plaintiff contrived to injure the writers of hymns), the scourge of Whittier and Longfellow (meaning that plaintiff's criticisms of the poets Whittier and Longfellow were like a scourge), the panegyrist of Walt Whitman, who wrote of him in a still unpublished poem, 'I love young Oscar (meaning plaintiff), a wind of the Northwest, full of vigor, cheek and elan' (meaning that plaintiff was full of impudence, and was brazen-faced in his attitude towards the hymn writers and the poets). For some months Prof. Triggs (meaning plaintiff) was collecting and comparing names for his baby. The baby was named at last, redeemed from anonymity, and the proud father (meaning plaintiff) once more had leisure to brood beneficently over the university and the universe. We have waited, not always with true philosophic patience, for the unfolding of his new thought. We knew that he would not leave the world barren for long. To quote Walt once more: 'Frequent, iterant, dripping and persistent like rain, regular as taxes, a stayer.' And now the god has spoken (meaning and intending to ridicule this plaintiff by likening him to a deity). At the Cook County League of Women's Clubs, Saturday, Prof. Triggs (meaning this plaintiff) looked into the seeds of time and had a vision of the 'new man.' Hear and tremble, miserable homuncules of to-day. 'The business man of the future would not be recognized by the business man of to-day. The present order of man will pass away. There shall come a new humanity. Notice the passing of patriotism, which is merely an expanded egotism. Notice the new state of diplomacy. All this points to the new era when the social spirit will prevail, when the selfish, the egoistic motive will be gone. The business man will wish to share his successes with the rest of society.' We hate to differ with

Prof. Triggs (meaning this plaintiff), but his remarks about patriotism are reported incorrectly, or there is some kink in his definition. If patriotism is expanded egotism, what is Triggs? If Triggs and patriotism are one, how can patriotism 'pass'? (Meaning this plaintiff, and meaning that this plaintiff is an example of expanded egotism, or more, or that he is devoted to self and selfishness.) We are ready to believe in the 'new humanity' and to welcome it, but what is new humanity without the same old and ever young Triggs (meaning this plaintiff)? Insisting that Triggs must and shall be preserved, let us cast an admiring glance at the business man of the future. He will share his successes with the rest of society. It would be Philistine to call for a bill of particulars. The new business man will divide his profits among his customers or among the whole community. The individual dividends may not be large, but they will show a kindly spirit in the divider. Presumably the customers or the community will consent to be assessed in case the business loses money. Let altruism have its perfect work. It may be hard for a thoroughly new business man to resist the temptation to give his goods away. As for Triggs (meaning this plaintiff), and all other altruistic professors of the Chicago University, they will pay Dr. Harper for the privilege of working for him. Already some of them delight to prepare for the new order by giving themselves away (meaning that this plaintiff should perform his services to the University of Chicago gratuitously or without pay, or that this plaintiff is not worthy of his hire)."

The next article was published April 6, 1903, and was:

"The news that Professor Oscar Lovell Triggs (meaning this plaintiff) of the University of Chicago may appear as a theatrical advance agent will give joy to every friend of higher education in America. Such a dazzling promotion for Professor Triggs (meaning this plaintiff) must at once make college teaching more attractive to ambitious young men. Hitherto the complaint has been that the pay is small, and the work leads to nothing more. A young man who might have been a lawyer with an income ranging from \$8,000 upwards, with a prospect of a seat on the bench, or perhaps a brilliant political career, might reasonably have hesitated before becoming a professor with an income of \$3,000 or \$4,000 at the utmost, and no brass bands and skyrockets. But Professor Triggs has blazed the way to new glories (meaning and intending to ridicule this plaintiff, and to compare him with a brass band or skyrockets). For years he (meaning this plaintiff) has been showing his colleagues that a professor of mettle can himself be both a brass band and a skyrocket. And now a theatrical manager offers him the exceeding great reward of \$700 a week

to travel ahead of a play called 'Romeo and Juliet,' placing the stamp of professional approval upon this production of a hitherto unknown author, and assure the good people of Indiana and Illinois that in his way Shakespeare is the equal of Gen. Lew Wallace, or even Professor William Cleaver Wilkin-son, of the University of Chicago. This is fine, and all the more so because, if Professor Triggs (meaning this plaintiff) keeps on developing, he will inevitably become the whole show himself (meaning and intending to ridicule and scoff at this plaintiff by charging him with sensationalism and misconduct in his profession, and with an intent to monopolize the duties of the department of English at the University of Chicago, and of incompetency and a lack of dignity and of ability)."

The last article was published April 10, 1903, and was as follows:

"Triggs and Romeo. To men of good liver, life is full of happiness. To us it is, and long has been, one of the greatest of these felicities to guide amateurs to Prof. Oscar Lovell Triggs (meaning this plaintiff), a true museum piece, and the choicest treasure in Dr. Harper's collection (meaning and intending to ridicule this plaintiff, by comparing him to a museum piece, or a freak or a curiosity, and by characterizing him as the principal attraction in a collection of other museum pieces, freaks, and curiosities). We cannot boast of having discovered Triggs (meaning this plaintiff), for he was born great, discovered himself early, and has a just appreciation of the value of this discovery (meaning that plaintiff, in his work, is governed by personal conceit, or an inflated idea of his own importance, and of the value of his work in the University of Chicago). But in our humble way we have helped communicate him (meaning plaintiff) to the world, assisted in his effusion and diffusion, and beckoned reverent millions to his shrine. We have joyed to see him (meaning this plaintiff) perform three heroic labors, viz.: (1) 'Knock out' old Whittier and Longfellow. (2) 'Do up' the hymn writers. (3) 'Name his baby at the end of a year of solemn consultation' (meaning and intending to charge that plaintiff, in his profession and in his position as an instructor in the department of English at the University of Chicago, had little or no regard for the value of the writings of the established poets, Whittier and Longfellow, or the writers of hymns, and intending to place him in a ridiculous and odious attitude by a reference to his private life and to domestic affairs). But these achievements are only the bright beginning of a long course of halcyon and vociferous proceedings. As yet, Prof. Triggs is but in the bud (meaning and intending this plaintiff, and

meaning and intending to place him in a ridiculous and odious position). He (meaning this plaintiff) came near blossoming the other day, and the English drama would have blossomed with him. A firm which is to produce 'Romeo and Juliet' offered him \$700 a week to be the 'advance agent' of the show, and to 'work up enthusiasm by lecturing.' Prof. Triggs (meaning this plaintiff) was compelled to decline the offer, but the terms of his refusal show that it is not absolute, and that 'some day,' as the melodramas cry, he will illuminate Shakespeare, dramatic literature, and the public mind: 'I regret my inability, at this time, to take advantage of this opportunity, for the plan proposed seems to me to be an excellent one. I would regard it, from my point of view, as an educational opportunity. It would gratify me to be able to present my views on drama, on Shakespeare and on this particular play to audiences that would gather together from a serious interest in the drama itself. This would be a form of "university extension" not hitherto tried, and which should be attended with good educational results—such as I would desire, and such, also, as I assume you would desire.' The nap is worn off the phrase 'university extension.' What Prof. Triggs (meaning this plaintiff) proposes, and the country hungers for, is Triggs (meaning this plaintiff) 'extension.' He must not give up to Chicago what was meant for mankind. His views on any subject are impressive, but on Shakespeare they would be as authoritative and final as it is his genius to be. As we have watched him (meaning this plaintiff) swatting Whittier and Longfellow, we have felt like yelling: 'What are thou drawn among these heartless hinds?' (Meaning and intending to ridicule and disgrace this plaintiff by placing him in a ridiculous and odious position with his associates in the department of English at the University of Chicago, and among English critics generally.) The professor (meaning this plaintiff) should take a man more nearly of his size. The Shakespeare legend should be allowed to delude no more. Prof. Triggs (meaning this plaintiff) can be depended upon to reduce this man Shakespeare to his natural proportions, club the sawdust out of that wax figger of literature, and preach to eager multitudes of the superiority of the modern playwrights, with all the modern improvements (meaning and intending to ridicule and disgrace this plaintiff by placing him in a ridiculous, odious, and contemptible position, and by attacking him in his position as an instructor in the department of English, and as a critic and writer of English generally). The so-called poetry and imagination visible in this Stratford charlatan's plays must be torn out, deracinated, the fellow (meaning this plaintiff) would call it, in his fustian style (meaning this plaintiff

and meaning and intending to charge that this plaintiff, in his lectures, refers to Shakespeare in a derogatory way, and as a charlatan play writer and dramatist, and that the plaintiff, in his criticisms and in his lectures before the students of the University of Chicago, would advise a change in the poetry and imagination of Shakespeare, and would have the presumption to insert his own style, which defendant charges is a fustian style, meaning inflated, bombastic, pompous, and turgid, and thereby defendant attacks plaintiff in his profession and in his position as a writer and lecturer, and attempts to place him in a ridiculous, odious, and contemptible position). If these plays are to be put upon the stage, they must be rewritten; and Prof. Triggs (meaning this plaintiff) is the destined rewriter, amender, and reviser. The sapless, old-fashioned rhetoric must be cut down. The fresh and natural contemporary tongue, pure Triggsian, must be substituted. For example, who can read with patience these tinsel lines? 'Madam, an hour before the worshipped sun peered forth the golden window of the east, a troubled mind drave me to walk abroad.' This must be translated into Triggsian (meaning the literary style of writing of this plaintiff) somewhat like this: 'Say, lady, an hour before sunup I was feeling wormy, and took a walk around the block' (meaning this plaintiff, and meaning and intending to charge this plaintiff with a gross, illiterate, and uncultivated style of address and writing, and intending to place this plaintiff in a ridiculous, odious, and contemptible position, and to make him an object of ridicule and derision). Here is more Shakespearian rubbish:

"O, she doth teach the torches to burn bright!
Her beauty hangs upon the cheek of night,
As a rich jewel in an Ethiop's ear."

"How much more forcible in clear, concise Triggsian: 'Say, she's a peach! A bird!' (Meaning this plaintiff, and meaning and intending to charge this plaintiff with a gross, illiterate, and uncultivated style of address and writing, and intending to place this plaintiff in a ridiculous, odious, and contemptible position, and to make him an object of ridicule and derision.) Hear 'Pop' Capulet drivel: 'Go to, go to, You are a saucy boy!' In the Oscar (meaning this plaintiff) dialect, this is this: 'Come off, kid. You're too fresh.' (Meaning this plaintiff, and meaning and intending to charge this plaintiff with a gross, illiterate, and uncultivated style of address and writing, and intending to place this plaintiff in a ridiculous, odious, and contemptible position, and to make him an object of ridicule and derision.) Compare the drop-sical hifalutin:

“Night's candles are burnt out, and jocund day
Stands tiptoe on the misty mountain tops,”

with the time-saving Triggsian version: ‘I hear the milk-man.’ (Meaning this plaintiff, and meaning and intending to charge this plaintiff with a gross, illiterate, and uncultivated style of address and writing, and intending to place this plaintiff in a ridiculous, odious, and contemptible position, and to make him an object of ridicule and derision.) The downfall of Shakespeare is only a matter of time, and Triggs (meaning this plaintiff, and meaning and intending to charge that a continuation of the lecture work of this plaintiff at the University of Chicago will end in the revulsion of sentiment against the writings of the famous Shakespeare, and intending to place this plaintiff in an odious and contemptible position among all lovers of the writings of Shakespeare and with the public generally). Carnegie ought to endow Triggs (meaning this plaintiff). Oscar Hammerstein ought to dramatize Triggs (meaning this plaintiff). Triggs is the hope, and soon will be the pride, of the stage. He ought to have not less than \$7,000 a week for fifty-three weeks a year (meaning to cast a slur on the literary attainments and intending to ridicule, deride, scoff at, and denounce the high literary character and the unquestioned ability of this plaintiff, and to attack him in his profession as a lecturer and writer at the University of Chicago, and to bring about his removal from his official position, and from his high standing with the public generally).”

To the complaint the defendant demurred upon the ground that it did not state facts sufficient to constitute a cause of action. The issue of law thus raised was tried at the Special Term, and the court found (1) that the complaint states facts sufficient to constitute a cause of action; and (2) that the statements complained of are libelous per se. It thereupon directed an interlocutory judgment overruling the demurrer, with costs, with leave to the defendant to answer within 20 days upon payment of costs, and, in default, that final judgment should be entered. The defendant appealed from such interlocutory judgment to the Appellate Division, where it was reversed, and the demurrer of the defendant sustained, with costs, with leave to the plaintiff to amend his complaint. Thereupon he appealed from the order of the Appellate Division by permission of that court.

Otto T. Hess and James W. Osborne for appellant [plaintiff]. Libel is a writing which sets a man in an odious or ridiculous light, and thereby diminishes his reputation. Chase's Blackstone (3d Ed.) 682; *White v. Nicholls*, 3 How. (U. S.) 266, 11 L. Ed. 591; *Hillhouse v. Dunning*, 6 Conn.

407; *Morey v. M. J. Assn.*, 123 N. Y. 207, 25 N. E. 161, 9 L. R. A. 621, 20 Am. St. Rep. 730; *Merrill on Newspaper Libel*, 40; *Cooper v. Greeley*, 1 Denio, 347; *Bouvier L. Dict.*, 528; *Penal Code*, Sec. 242; *Moore v. Francis*, 121 N. Y. 199, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810; *Gates v. N. Y. R. Co.*, 155 N. Y. 228, 49 N. E. 769. Whatever words have a tendency to hurt or are calculated to prejudice a man who seeks his livelihood by any trade or business are actionable. *Krug v. Pitass*, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317; *Mattice v. Wilcox*, 147 N. Y. 624, 42 N. E. 270. The words complained of are libelous, whether referring to the plaintiff as a professor or as an individual. *Moffatt v. Cauldwell*, 3 Hun, 26; *Martin v. P. P. Co.*, 93 App. Div. 531, 87 N. Y. Supp. 859. It is not necessary to allege special damage in the case at bar. *Mattice v. Wilcox*, 147 N. Y. 624, 42 N. E. 270; *Shea v. S. P. & P. Ass'n*, 14 Misc. Rep. 415, 35 N. Y. Supp. 703; *Sanderson v. Caldwell*, 45 N. Y. 398, 6 Am. Rep. 105; *Queen v. Cooper*, L. R. 2 Q. B. D. 513; *Bergmann v. Jones*, 94 N. Y. 64; *Gibson v. S. P. & P. Ass'n*, 71 App. Div. 566, 76 N. Y. Supp. 197; *Morrison v. Smith*, 177 N. Y. 366, 69 N. E. 725.

Franklin Bartlett for respondent [defendant]. The words complained of and set forth in the complaint are not libelous per se of the plaintiff as an individual. *Goldberger v. P. G. Pub. Co. (C. C.)* 42 Fed. 42; *Stone v. Cooper*, 2 Denio, 293. The words complained of are not libelous per se of the plaintiff in his alleged profession or occupation as an instructor or teacher. *Cruikshank v. Gordon*, 118 N. Y. 178, 23 N. E. 457; *Moore v. Francis*, 121 N. Y. 199, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810; *Mattice v. Wilcox*, 147 N. Y. 624, 42 N. E. 270; *Krug v. Pitass*, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317; *Cooper v. Stone*, 2 Denio, 299; *Labouisse v. E. P. P. Co.*, 10 App. Div. 30, 41 N. Y. Supp. 688; *Battersby v. Collier*, 34 App. Div. 347, 54 N. Y. Supp. 363; *Ratzel v. N. Y. N. P. Co.*, 67 App. Div. 598, 73 N. Y. Supp. 849. The complaint contains no averment of special damage. *Langdon v. Shearer*, 43 App. Div. 607, 60 N. Y. Supp. 193; *King v. S. P. & P. Assn.*, 84 App. Div. 310, 82 N. Y. Supp. 787. The articles are not libelous per se, because they do not charge the plaintiff with having done anything which he had not a legal right to do. *Foot v. Pitt*, 83 App. Div. 78, 82 N. Y. Supp. 464; *Stone v. Cooper*, 2 Denio, 301. The alleged libels are merely criticisms of the ideas and theories of the plaintiff, and of his literary compositions, and, there being no averment of special damage, such criticism is not libelous or actionable.

Carr v. Hood, 1 Camp. 355; Strauss v. Francis, 4 F. & F. 1107; Swan v. Tappan, 5 Cush. (Mass.) 104; Young v. Macrae, 3 B. & S. 264; Dooling v. B. P. Co., 144 Mass. 258; 10 N. E. 809, 59 Am. Rep. 83; M. F. A. Co. v. Shields, 171 N. Y. 384, 64 N. E. 163, 59 L. R. A. 310; Dowling v. Livingstone, 108 Mich 321, 66 N. W. 225, 32 L. R. A. 104, 62 Am. St. Rep. 702.

MARTIN, J. This action was for libel. The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. By interposing a demurrer upon that ground, all the facts alleged in the complaint, or which can by reasonable and fair intendment be implied from the allegations thereof, are deemed admitted. Marie v. Garrison, 83 N. Y. 14; Sanders v. Soutter, 126 N. Y. 193, 195, 27 N. E. 263; Ahrens v. Jones, 169 N. Y. 555, 559, 62 N. E. 666, 88 Am. St. Rep. 620.

A written or printed statement or article published of or concerning another which is false, and tends to injure his reputation, and thereby expose him to public hatred, contempt, scorn, obloquy, or shame, is libelous per se. Riggs v. Denniston, 3 Johns. Cas. 198, 2 Am. Dec. 145; Steele v. Southwick, 9 Johns. 214; Van Ness v. Hamilton, 19 Johns. 349, 367; Root v. King, 7 Cow. 613; Cooper v. Greeley, 1 Denio, 347; Shelby v. Sun Printing & P. Ass'n, 38 Hun, 474, affirmed 109 N. Y. 611, 15 N. E. 895; McFadden v. Morning Journal Ass'n, 28 App. Div. 508, 51 N. Y. Supp. 275; Bergmann v. Jones, 94 N. Y. 51, 64; Moore v. Francis, 121 N. Y. 199, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810; Morey v. Morning Journal Ass'n, 123 N. Y. 207, 25 N. E. 161, 9 L. R. A. 621, 20 Am. St. Rep. 730; Mattice v. Wilcox, 147 N. Y. 624, 42 N. E. 270; Gates v. N. Y. Recorder Co., 155 N. Y. 228, 49 N. E. 769; Morrison v. Smith, 177 N. Y. 366, 69 N. E. 725.

When the articles published by the defendant of and concerning the plaintiff are read in the light of the foregoing principles of law, it becomes obvious, we think, that they were libelous per se. It seems impossible for any fair-minded person to read the articles alleged in the complaint without reaching the conclusion that they were not only intended, but necessarily calculated, to injure the plaintiff's reputation, and to expose him to public contempt, ridicule, or shame.

It is contended by the respondent [defendant] that the articles published were a mere comment or criticism of matters of public interest and concern, and hence were privileged. While every one has a right to comment on matters of public interest, so long as one does so fairly, with an honest purpose,

and not intemperately and maliciously, although the publication is made to the general public by means of a newspaper, yet what is privileged is criticism, not other defamatory statements; and, if a person takes upon himself to allege matters otherwise actionable, he will not be privileged, however honest his motives, if those allegations are not true. When a publisher goes beyond the limits of fair criticism, his language passes into the region of libel, and the question whether those limits have been transcended may become a question of law, but ordinarily presents a question for the jury. *Fay v. Harrington*, 176 Mass. 270, 57 N. E. 369. It is true that an author, when he places his work before the public, invites criticism; and, however hostile it may be, the critic is not liable for libel, provided he makes no misstatements of material facts contained in the writing, and does not go out of his way to attack the author. The critic must, however, confine himself to criticism, and not make it the veil for personal censure, nor allow himself to run into reckless and unfair attacks merely for the purpose of exercising his power of denunciation. If, under the pretext of criticising a literary production or the acts of one occupying a public position, the critic takes an opportunity to attack the author or occupant, he will be liable in an action for libel. *Cooper v. Stone*, 24 Wend. 434; *Mattice v. Wilcox*, 71 Hun, 485, 488, 24 N. Y. Supp. 1147, affirmed 147 N. Y. 624, 42 N. E. 270; *Hamilton v. Eno*, 81 N. Y. 116. * * *

In this case it is obvious that the articles complained of go far beyond the field of fair and honest criticism, and are attempts to portray the plaintiff in a ridiculous light. As was in effect said by the learned judge in the dissenting opinion below: The articles complained of represent the plaintiff as illiterate, uncultivated, coarse, and vulgar, and his ideas as sensational, absurd, and foolish. They also represent him as egotistical and conceited in the extreme, and convey the impression that he makes himself ridiculous both in his method of instruction and by his public lectures. They also ridicule his private life, by charging that he was unable to select a name for his baby until after a year of solemn deliberation. In short, they effect to represent him as a presumptuous literary freak. These representations concerning his personal characteristics were not within the bounds of fair and honest criticism, and are clearly libelous per se.

It is likewise claimed by the respondent that these articles were written in jest, and hence that it is not liable to the plaintiff for the injury he has sustained. It is, perhaps, possible that the defendant published the articles in question as a jest, yet they do not disclose that, but are a scathing denun-

ciation, ridiculing the plaintiff. If, however, they can be regarded as having been published as a jest, then it should be said that, however desirable it may be that the readers of, and the writers for, the public prints shall be amused, it is manifest that neither such readers nor writers should be furnished such amusement at the expense of the reputation or business of another. In the language of Joy, C. B.: "The principle is clear that a person shall not be allowed to murder another's reputation in jest;" or, in the words of Smith, B., in the same case: "If a man in jest conveys a serious imputation, he jests at his peril." *Donoghue v. Hayes* [1831], *Hayes, Irish Exchequer*, 265, 266. We are of the opinion that one assaulting the reputation or business of another in a public newspaper cannot justify it upon the ground that it was a mere jest, unless it is perfectly manifest from the language employed that it could in no respect be regarded as an attack upon the reputation or business of the person to whom it related.

The single purpose of the rule permitting fair and honest criticism is that it promotes the public good, enables the people to discern right from wrong, encourages merit, and firmly condemns and exposes the charlatan and the cheat, and hence is based upon public policy. *The distinction between criticism and defamation is that criticism deals only with such things as invite public attention or call for public comment, and does not follow a public man into his private life, or pry into his domestic concerns. It never attacks the individual, but only his work. A true critic never indulges in personalities, but confines himself to the merits of the subject-matter, and never takes advantage of the occasion to attain any other object beyond the fair discussion of matters of public interest, and the judicious guidance of the public taste.*¹⁰ The articles in question come far short of falling within the line of true criticism, but are clearly defamatory in character, and are libelous per se.

It follows that the order of the Appellate Division, and the interlocutory judgment entered thereon reversing the interlocutory judgment of the Special Term, should be reversed, the judgment of the Special Term affirmed, with costs to the appellant in all the courts, and the question certified answered in the affirmative.

PARKER, C. J., and BARTLETT, VANN, CULLEN, and WERNER, JJ., concur.

O'BRIEN, J., absent.

Order reversed, etc.¹¹

¹⁰ The italics are the editor's.

¹¹ The final judgment was for the plaintiff, on the ground that the defendant went outside the field of legitimate criticism.

HOEY v. NEW YORK TIMES CO.

(Supreme Court, Appellate Division, First Department, New York, 1910. 138 App. Div. 149, 122 N. Y. Supp. 978.)

LAUGHLIN, J.¹² This is an action for a libel. In the year 1907, plaintiff was a resident of the borough of Manhattan, N. Y., and conducted business therein as a real estate broker and was a member of the Assembly for the Thirteenth Assembly district. There was prior to the 7th day of March that year a bill, entitled "An act to amend the Greater New York Charter as re-enacted by chapter 466 of the Laws of 1901, in certain parts relating to the police department," which was commonly known as the "Bingham police bill," introduced in the Assembly. On that day the New York Times, a daily newspaper published by the defendant, contained an article on the editorial page, the heading of which was in heavy type, as follows:

"The Police Bill.

"The New York City police bill is on the order of third reading in the lower house, and is scheduled to come to vote this morning. To those Republican and Democratic Assemblymen, whether from up state or from this city who are minded to cast their vote against the measure a word, if they are wise should suffice.

"The bill is designed to safeguard the lives and property of one-half the state. This is a wealthy city, but just now it is a wrathful city. It is behind Commissioner Bingham in his effort to become something more than titular head of police.

"There is power within the city—and it is aroused—with which no single legislator or clique may wish to cope.

"It is rumored that the bill will be passed by the Assembly and will be killed in Senate. However the bill may fare, who so registers his vote against it to-day will be noted."

The bill was reached and passed by the Assembly by an affirmative vote of 92, with 47 members, of whom the plaintiff was one, voting in the negative. Pursuant to the editorial announcement herein quoted, the defendant published an article on the editorial page of the Times on the 8th day of March, 1907, headed in heavy-faced type, as follows:

"Roll of Dishonor.

"Despite all opposition, with a vote of 92 to 47, Commissioner Bingham's bill reorganizing the corrupt police force

¹² Part of the opinion is omitted.

has passed the Assembly. Of the 47 adverse votes 32 were cast by Democratic Assemblymen misrepresenting this city, and two by the Kings Republicans, Eichhorn and Voss, the one an Odell man and the other Inspector Schmittberger's legal counsel.

"We are not prepared to say that the sins of thirty-four thugs, selected from the thirty thousand criminals that go about this city under police protection, are not of snow driven purity compared with what these thirty-four Greater New York Assemblymen were trying and failed to do. They have done what they could to strengthen the league of the police with gamblers, with harlots, with thieves, with all the sources of civil and moral corruption that the 'system' connotes."

The plaintiff alleges that these articles were maliciously published of and concerning him, and were calculated to, and did, hold him up to scorn, hatred, and ridicule, and particularly to the residents of the assembly district which he represented, to his injury and damage in his business, social standing, good name, and reputation, in the sum of \$50,000. He further alleges, by way of innuendo, the following:

"That said editorials were intended to convey, and did convey, to the community at large, the impression that the plaintiff herein was guilty of malfeasance and misfeasance in office, and of conduct in direct variance with his oath of office, and of connivance and illegal co-operation in a corrupt 'league of police,' with various criminals and disorderly persons, and that the plaintiff was an accessory to an alleged conspiracy between said police of the city of New York and said disorderly and criminal persons. That the plaintiff, in attempting 'to strengthen the league of police' with said immoral and disorderly persons, had been guilty of acts in guilt with the sins and crimes of criminals of this city."

The plaintiff gave evidence tending to show that he openly, publicly, and consistently opposed the bill, not with a view to strengthening any league of the police with gamblers, harlots, or thieves, if such league existed, as to which he had no knowledge, but because he was convinced that it was unwise legislation; that while all of the newspapers, with one exception, and many civic organizations, favored the bill, it was opposed by one newspaper and by many of his constituents and by others; and that before voting on it he endeavored to ascertain the sentiment of his constituents and found no sentiment in favor of the bill. He offered no evidence, other than the articles themselves, tending to show malice on the part of the defendant.

This appeal presents but a single question, and that is whether the second editorial article, herein quoted, exceeded the bounds of fair and honest criticism of a public official, which is privileged, or rather permitted in the interest of the public welfare, and became defamatory by impugning the motives of the plaintiff in voting against the bill. It is contended in behalf of plaintiff that it charged that his object and purpose in so voting was to strengthen the league to which reference is made in the article, and inferentially that he was actuated by unlawful and corrupt motives. The law applicable to this question is perfectly well settled. The only difference of opinion among the members of the court arises on the construction of the second editorial.

In *Hamilton v. Eno*, 81 N. Y. 116, which is the leading case on the subject in question in this state, Dr. Hamilton sued the defendant for libel in publishing an article in the *Tribune* with respect to a report which he made as an assistant inspector of the board of health, and which had been published in the *City Record*. It was held, in effect, that there was a right which the court designated a qualified privilege to discuss and to criticise the report and the official acts of the public official without any limitation in the absence of actual malice; but that the publication exceeded the bounds of such criticism, and became an aspersive attack upon the character and motive of the plaintiff and a recovery was sustained. Judge Folger, writing for the court and discussing certain exceptions to the charge, among other things, said:

"* * * The occasion that makes a communication privileged is when one has an interest in a matter, or a duty in regard to it, or there is a propriety in utterance, and he makes a statement in good faith to another, who has a like interest or duty, or to whom a like propriety attaches to hear the utterance. *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Klinck v. Colby* [46 N. Y. 427, 7 Am. Rep. 360] *supra*; *Sunderlin v. Bradstreet*, 46 N. Y. 191 [7 Am. Rep. 322]. And, in a qualified way, the occasion exists when there has been put forth a publication of general public interest, or the publication thus made in itself is one to which public interest has been invited. Then there is a right to make comment upon that publication. And like to this are the acts and conduct of public functionaries, and, of course, their official productions, when made public by themselves or in the due course of the public business.

"We think that the occasion of the defendant's publication was such as that first stated. The plaintiff had made an official report recommending a certain kind of street pavement. It was calculated to make public favor for that pave-

ment. The official character of its author, which was impressed upon the report, made it more important and effective. If the municipal authorities should be led to adopt it, by the public favor shown to it, or the public demand for it, and use it upon the streets, that action would be at the cost of property owners, and to the public good or ill. The official report tending to this result was spread before the community in a public journal, and the common attention drawn to it. Every citizen had a right to discuss the question as publicly as the report had done so. So that the time and mode of the publication of the defendant made the occasion of it this far privileged. Such an occasion must, however, be used fairly and in good faith, with a view to the public interest and good, and without evil or malicious motive. In the case in hand, there was the report of the plaintiff, and it was his report made officially. It was, therefore, the subject of criticism as a work upon a matter of public interest, and also as the act of an official person. As a work, the defendant might question its statements of fact and deny them; he might expose misrepresentations and point out errors; he might combat its reasoning and show its conclusions ill drawn; and he might do so with satire and ridicule, so long as he directed those missiles at the report and the contents of it. But he could not attack the private character of the author; to do so would be libelous. *Cooper v. Stone*, 24 Wend. 442. Now, it did not affect the report or its merits, so far as the author was concerned as a private person, that he wrote what was dictated to him by the pavement company. * * *

"It is, therefore, with the report as an official act, and with its author as a public servant, that we are principally concerned. It is apparent that to say of such a matter from such a person that its statements were dictated by interested persons, and that the author was rewarded for it from their private means, is calculated to injure the official and private reputation of the author. Now one may in good faith publish the truth concerning a public officer; but, if he states that which is false and aspersive, he is liable therefor, however good his motives. A person in public office is no less to be protected than one who is a candidate for public office; and the law of libel must be the same in each case. The public have as much interest in knowing the true character of one who is seeking a place of trust as that of one who holds it. There must be as much and no more privilege of utterance as to one than the other. Yet it is the law of this state that to accuse a candidate for public office of an offense is not privileged, though the charge was made

without evil motive, and in the exercise of a political right (*Lewis v. Few*, 5 Johns. 1); and though the libel relate to a public act of the candidate in his official place (*Id.*; *Root v. King*, 7 Cow. 613, affirmed on error brought [*King v. Root*] 4 Wend. 113 [21 Am. Dec. 102]). It cannot be different when the charge is against one holding an office. See *Edsall v. Brooks*, 17 Abb. Prac. 221. So it seems to be in other states. *Com. v. Clap*, 4 Mass. 163 [3 Am. Dec. 212]; *Curtis v. Mussey*, 6 Gray [Mass.] 261; *Seely v. Blair*, *Wright (Ohio)* 358, 683; *Brewer v. Weakley*, 2 Overt. (Tenn.) 99 [5 Am. Dec. 656]; *Mayrant v. Richardson*, 1 *Nott & McC. (S. C.)* 347, [9 Am. Dec. 707]. * * *

"We are of the opinion that the official act of a public functionary may be freely criticised, and entire freedom of expression used in argument, sarcasm, and ridicule upon the act itself; and that then the occasion will excuse everything but actual malice and evil purpose in the critic. We are of the opinion that the occasion will not of itself excuse an aspersive attack upon the character and motives of the officer; and that, to be excused, the critic must show the truth of what he has uttered of that kind."

Recently the Court of Appeals, in *Triggs v. Sun Printing & Pub. Ass'n*, 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep. 841, further elucidated this rule as follows: "The single purpose of the rule permitting fair and honest criticism is that it promotes the public good, enables the people to discern right from wrong, encourages merit, and firmly condemns and exposes the charlatan and the cheat, and hence is based upon public policy. The distinction between criticism and defamation is that criticism deals only with such things as invite public attention or call for public comment, and does not follow a public man into his private life or pry into his domestic concerns. It never attacks the individual, but only his work. A true critic never indulges in personalities, but confines himself to the merits of the subject-matter, and never takes advantage of the occasion to attain any other object beyond the fair discussion of matters of public interest and the judicious guidance of the public taste."

The rule is stated in the *Encyclopedia of Law and Procedure* (volume 25, pp. 243, 401) as follows: "The interests of society require that immunity should be granted to the discussion of public affairs, and that all acts and matters of a public nature may be freely published with fitting comment or strictures. But the privilege is limited strictly to comment and criticism, and does not extend to protect false statements, unjust inferences, imputations of evil motives, or

criminal conduct, and attacks upon private character; the publisher being responsible for the truth of what he alleges to be facts. * * * Comment on and criticism of the acts of public men are privileged if fair and reasonable and made in good faith. But the right to criticise does not embrace the right to make false statements of fact, to attack the private character of a public officer, or to falsely impute to him malfeasance or misconduct in office."

It follows, from this statement of the law, that if the editorial exceeded the bounds of fair and honest criticism, and was "an aspersive attack upon the character and motives" of the plaintiff, it is libelous.

It is to be borne in mind that the plaintiff was entitled to have the case submitted to the jury, either if the articles were libelous per se, without any innuendo, or if they were susceptible of the meaning ascribed to them in the innuendo, for, if libelous per se, it would be the duty of the court to so decide as a matter of law, but if ambiguous, and in any aspect of the case the articles are susceptible of the meaning ascribed to them in the innuendo, it would be the duty of the court to leave it to the jury to determine in what sense the words were used and would be understood by readers of ordinary and average intelligence, and if they would be so understood that they would be libelous. *Morrison v. Smith*, 177 N. Y. 386, 69 N. E. 725; *Moore v. Francis et al.*, 121 N. Y. 199, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810.

The fact that the plaintiff was a public official, and that the articles related to him in his official capacity, which gave full license to the press to discuss, to comment on, and to criticise his official action, provided the so-called "qualified privilege" was not abused by being exercised through actual malice, does not alter the rule that, if the words or articles as a whole are not ambiguous, it is for the court to decide as matter of law whether they exceeded the bounds of fair and honest criticism and became defamatory, and that, if they are ambiguous and are susceptible of the libelous meaning, then whether or not they would be understood in the libelous sense must be for the jury. I am of opinion that the articles were not necessarily libelous per se, but that it should have been left to the jury to determine whether or not readers of ordinary and average intelligence would understand the articles as charging that the plaintiff, in opposing and voting in opposition to the bill, was corruptly and improperly influenced by a desire to aid and assist the league to which reference is made, and which, if it exists, must have been founded upon bribery and corruption.

In *Morrison v. Smith*, supra, the Court of Appeals say: "If the words are incapable of the meaning ascribed to them by the innuendo, and are, prima facie, not actionable, the complaint should be dismissed. If they are capable of such a meaning, however improbable it may appear, the jury should say whether they may be so understood."

In deciding the question as to whether or not the articles are libelous, the scope and object of the entire articles are to be considered together. *More v. Bennett*, 48 N. Y. 472, 476. The articles do not quote from the bill, and it may well be that the readers would have only such knowledge thereof as is conveyed by these articles, which state what the writer deemed to be the effect, if not the express object, of the bill. In the first editorial, the *Times* gave notice that, whether the bill passed or not, those who voted against it would be "noted." The second article, published after the bill had passed the Assembly, is headed in large type, "Roll of Dishonor," and, after stating the action of the Assembly on the bill, the names of the members who voted against it are published in full under the statement, "Here is the roll of dishonor." Then follows the language which it is contended by the learned counsel for the respondent relates to the effect of the defeat of the measure; but which it is claimed by counsel for appellant charged plaintiff with having been actuated by corrupt or other evil motives. Within the authorities cited, there is no limitation on just and honest criticism of the official act, and there is no liability, excepting on the theory that these articles went beyond the bounds of criticism of the official act and constituted an attack upon the motives or character of the plaintiff. The *Times* has pictured the consequences that would follow the defeat of the bill in any manner, no matter how seriously it would reflect on the judgment or official efficiency of those who vote against the measure; but I am of opinion that it may not be held as matter of law that the second editorial is not susceptible of the meaning that plaintiff was actuated by corrupt or other evil motives. It should, therefore, have been left to the jury to determine whether readers of ordinary and average intelligence would not understand that to be the charge made by the defendant by the publication of these editorials.

It follows, therefor, that the judgment should be reversed, and a new trial granted, with costs to appellant to abide the event.

SCOTT and MILLER, JJ., concur.

INGRAHAM, P. J. (dissenting). In the year 1907 the plaintiff was elected a member of Assembly in the Thirteenth Assembly district in the city of New York, and entered upon

the discharge of his duties in the Legislature. His course in voting against a certain bill relating to police matters in the city of New York was disapproved of by several newspapers, including the one published by the defendant, and it is in consequence of an article criticising his vote in opposition to that bill that it is claimed the defendant published a libel. The plaintiff had been elected to represent the residents of his district in the Legislature, and as such his official acts were subject to criticism. It certainly is not libelous for the people to call their representatives to account for official action claimed to be against the best interests of the city; it is not a libel to allege that a particular vote was against the welfare of the city. It is settled in this state that a citizen has a right to criticise the official acts of public officials. I agree that to say a public official acts disgracefully for private gain would be a libel, but to say that the action of a representative in the Assembly, or any other public body, is an injury to and disgraces the city or state, without imputing improper or corrupt motives, is criticism which I think comes within the qualified privilege. The question is discussed at length in *Hamilton v. Eno*, 81 N. Y. 116.

There is no dispute, as I understand it, as to the law; the only question being whether this publication does as a fact charge the plaintiff with anything more than that the effect of his vote was to injure the city and sustain the lawbreakers, rather than uphold those who were trying to enforce the law. The article stated that this plaintiff and his associates had "done what they could to strengthen the league of the police with gamblers, with harlots, with thieves, with all the sources of civil and moral corruption that the 'system' connotes," and the roll of those who voted in a way that would accomplish this purpose was called a "Roll of Dishonor." I cannot see that there was here anything that impugned the motives of the plaintiff or charged him in any way with an improper motive in voting as he did. It seems to me that the distinction must necessarily be between a criticism of the official conduct as to its effect upon the community and impugning the motives of the public official in the action that he has taken. Although this article may be severe, there is nothing in it that I can see that directly charges this plaintiff with an improper motive. What is said is that his action was against the best interests of the city and supported those who were opposed to public law and order, and that those who voted in that way composed a "Roll of Dishonor." But there is no charge of personal corruption; no charge of an improper motive; and every word may be true, and still the plaintiff may have acted from the most conscientious motives in voting as

he thought best for the public welfare. Representative government would be impossible unless the people could freely criticise the official acts of their representatives, and, as long as such criticism is directed towards the effect of the official acts of a public official, it cannot be a libel *per se*, and to support an action based on such criticism there must be an allegation of actual malice.

What was said in *Triggs v. Sun Printing & Pub. Ass'n*, 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep. 841, does not apply to the right of the public to criticise one of its representatives. Whether or not this privilege exists I think is a question of law for the court and not for the jury, and to submit to the jury the question as to whether the privilege existed or whether the article impugns the plaintiff's motives would be allowing the jury to determine what is really a question of law that it is the duty of the court to determine. In order to sustain the view expressed in the prevailing opinion, the learned judge recognized that this editorial must be susceptible of a meaning that plaintiff was actuated by corrupt or other evil motives, and I cannot see that this article justifies such an inference.

I think the court was right in disposing of the question as a matter of law, and that the complaint was properly dismissed.

CLARKE, J., concurs.¹³

EIKHOFF v. GILBERT et al.

(Supreme Court of Michigan, 1900. 124 Mich. 353, 83 N. W. 110.)

HOOKER, J. The defendants are members of an organization called the "Good Government League," in the city of Detroit, which professes to have for its object the election of worthy men to office, and the promotion of good order and honest administration of city affairs. The plaintiff, having attended one session of the Legislature in the capacity of representative, was a candidate for re-election. This action is for libel, alleged to have consisted of three publications over the names of the defendants. One, for convenience called the "White Circular," was addressed to the voters, and contained in parallel columns the names of several candidates

¹³ Compare Rev. Laws Okl. 1910, § 2381: "A privileged publication is one made: * * * Third. By a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticised."

whom the electors were advised to vote for or against. The portion applicable to the plaintiff was as follows:

For	Vote	Against
<p>Harry C. Barter for representative, because he represents all that is good in his opponent, and does not represent the objectionable. He is the champion of labor and arbitration.</p>		<p>Henry Eikhoff for representative, because in the last legislature he championed measures opposed to the moral interests of the community.</p>

Another, called the "Pink Circular," contained the following:

"Read and Reflect Before You Vote.

"The executive council of the Good Government League has carefully examined the record of each candidate for office. Where opposing candidates are equally bad or equally good, we make no recommendations. The following suggestions are made in the hope that they may aid you in the discharge of your duty as a citizen, and that righteousness may prevail in public as well as in private affairs:

"Lou J. Burch is candidate on the Republican ticket for representative. All friends of morality and decency are asked to vote against him for the following reasons: Lou J. Burch is secretary of the Michigan Liquor Dealers' League. He is editor of the official organ of that league. He is a self-avowed candidate for the liquor dealers, and desires to go to the legislature to work in the interest of the saloon. Lou J. Burch is editor and publisher of a scurrilous sheet, dated Saturday, but always issued Sunday morning. In his paper the ministry is ridiculed, women are maligned, and workers for the cause of righteousness are defamed. Lou J. Burch is the champion of saloon lawlessness and of vulgar theaters. Lou J. Burch has offered insult to every colored man, woman, and child in Detroit. In witness of these facts, read the following statements from his own sheet:

"The liquor interests of the city are likely to have something to say in the convention. Lou J. Burch, editor of ———, is their candidate.' October 29, 1898.

"Here and there could be seen the burly forms of chicken-fed preachers, arrayed in long, dark, frock coats, with hair pompadour, and smile urbane as the harvest moon, moving about among the female portion of the flock, thinking what a snap they had. It was a veritable Eden for them, and it was full of ripe luscious apples, and no snakes. A preacher is never so near his heaven as when in charge of a menless audience or convention.' January 22, 1898.

"Speaking editorially of one of Woodward avenue's most

prominent and popular ministers, the sheet says: '* * * He is either crazy, a fool, or both; and that at best, he is a weak, narrow-minded bigot, without religion or sense.' May 7, 1898.

"Referring to deaconesses and other Christian workers, Burch's paper says: 'The front row of chairs was occupied by as interesting a bunch of short-haired long-nosed women, of doubtful age, as one would meet in a long search.' October 1, 1898.

"Referring to prominent pastors and church workers who were at police court recently, Burch's paper says they were 'as fine a looking lot of spies and sneaks as ever put powder to a safe.' October 1, 1898. 'And still these awful good and pious old ladies can never see anything wrong with hugging and kissing bees and grabbag bunco games as they are carried on at the regulation church socials.' October 22, 1898.

"In commenting upon the discharge in the recorder's court of a saloonist, Burch's paper says: 'The outcome of all these cases should be the same as this first one, and probably will be. Mathews was defended by Navin & Sheehan.' October 15, 1898.

"Burch's paper spoke as follows concerning the effort to close the Capitol Square Theater: '* * * Agitating against the Capitol Square Theater with the intention of closing it, but without success, for the simple reason that there is no excuse for such an outrageous procedure.' April 2, 1898.

"After the evidence upon which the theater was closed was in, Burch's paper said: 'As the investigation now stands, there can be but one result, the complete vindication of Dr. Campbell.' April 9, 1898. 'Republican politicians about town are wondering which side of the fence Charlie Joslyn will be found upon in the Pingree and anti-fight this year. Pingree bought Charlie with a \$5,000 per year job two years ago, but there is a rumor that the foxy Charlie is looking for a raise this year. April 16, 1898. 'Should Stay Away—Negroes must Realize that There is a Line. The question of the color line has arisen in Detroit once more. A negro claims that he was discriminated against at Stock's Riverside Park. This statement is denied, however. He had no business there. Negroes must realize the fact that white people will associate with them more or less in business, but will certainly refuse to be on equal terms with them socially. Knowing the objection there is for their company, why does the negro force it? No gentleman would. White men would be forcibly ejected from any place where they made themselves half as obnoxious as do most colored people. It has since transpired that the negro anxious for a case made no complaint to Mr. Stock, but

straightway rushed into court. Mr. Stock is a very fair-minded gentleman, and is willing, and always used Detroit citizens liberally, and there is no doubt they will support him against the arrogance of Detroit's colored population.' May 28, 1898. 'The ladies of the W. C. T. U. have been having sixteen fits each all the week over a showbill in which a man is depicted in the act of choking a woman. If the man in question had a grip on a half dozen or more men-women who have been making fools of themselves here in Detroit for the past year, the picture would be better appreciated by a large majority of the people.' October 29, 1898.

"Burch probably desires the repeal of the minor law. Judge from the following: 'To Fathers and Mothers: Fathers and mothers of Michigan, has it ever occurred to you that the doors of the saloon are barred against your minor sons and daughters, while they can enter a drug store with seeming propriety, and sip intoxicating drinks issued from a soda fountain? Which of the two institutions is the more likely to start innocent youth on the downward path? Do you think it fair and just to continually persecute the licensed saloonkeeper, who executes a large bond guarantying the proper conduct of his place, and wink at the unlicensed whisky-selling druggist? Pause and consider.' June 4, 1898.

"For several weeks Burch's paper has carried the following in display type: 'Below are the names of the 39 men who not only voted against this particular bill, but used their influence against the liquor interests during the entire session. Don't wait for the election this fall, but be on hand at the caucuses and the conventions, and see to it that these 39 men get just what they gave you—the dump.' September 24, 1898.

"By your vote do you desire to ask the state to bear the expenses and pay the expenses and pay the salary of the saloonkeepers' lobbyist? That your vote may be effective, we ask all who may refuse to vote for Burch to concentrate their votes upon Alex W. Blain. For reasons which we consider equally as good, we ask you to vote against Henry Eikhoff, candidate for representative, and for Harry C. Barter."

There was a third, but it is unimportant. The declaration alleged that the effect and meaning of the pink circular was to charge and impute by inference and intent, upon the plaintiff, all of the wrongful, indecent, immoral, wicked, and scandalous acts charged against said Burch. The court excluded the pink circular as not libelous, and directed a verdict for the defendants upon the other counts.

The question before us is whether the case should have been submitted to the jury upon one or both counts. The first charge is, in substance, that the plaintiff, in his official ca-

capacity of representative, championed measures opposed to the moral interests of the community. The undisputed testimony shows that as representative he introduced, and, to some extent, at least, approved and supported, measures calculated to change the liquor laws of the state by permitting sales on legal holidays, and election days after the close of the polls, and by repealing the act prohibiting screens in saloons. The court charged the jury that:

"The conclusion of the article, and the views as expressed by the defendants in that article, must of necessity, under the circumstances of the case, be termed a deduction from his record in the case. It is a question upon which men may differ. It probably will be very difficult to determine with any unanimity as to whether such measures were against the moral interests of the community. It is a question of judgment; in other words, based, in my opinion, upon his record in the Legislature. Whether it is for the moral interests of the community, is an open question. In my judgment, it was such a criticism upon his acts as might legitimately be made by any voter to the voting population of the state or of the county from which he asked to receive the suffrage of the people. If it were true that those acts were against the moral interests of the community, he would have no case here. If they were false, then the question of qualified privilege, as we say in law, would arise. There are certain things which persons may say under certain circumstances which are called privileged in the law—qualifiedly privileged—and it depends upon the occasion as to whether an utterance or publication is privileged. I charge you that in this case this was a privileged occasion. If they had the right to criticise the acts of this man, being a man running for public office, and one who asked to receive the trust and confidence of the people to perform the duties of that public office, they had a right to criticize him; and, though it was false, it would not be actionable unless it was published with malice or in bad faith. I do not think in this case there is any evidence of malice outside of the publication itself—any positive proof—which, in my judgment, would be required to be shown on the part of the plaintiff. Hence, if the publication was false, if it was such a publication as would require justification to be shown,—which would be true if the occasion was not privileged; it being privileged and false, if they acted in good faith, and without malice, the plaintiff would have no right to recover. I don't think there is any evidence of malice, as I said, or ill will, on the part of the defendants in this case; and on the whole case—on the evidence as it has appeared in this case—I charge

you to find for the defendants. The verdict is, 'Not guilty,' I think. The clerk will take the verdict."

The language of the white circular, unexplained, unequivocally charged the plaintiff with having championed legislation opposed to the moral interests of the community. This charge is an attack upon his moral character, and would be likely to bring him into public contempt and disgrace. It is, therefore, libelous per se. The defense made was: First, that the statement was true; and, second, that, if it cannot be said to be true, the proven acts were subject to criticism, and defendants had the right to express their opinion as to their effect—in other words, that the language was privileged. The defendants had a right to discuss the fitness of the plaintiff for the office to which he aspired, and might lawfully communicate to the electors any facts within their knowledge concerning his character or conduct, and express their opinions upon them, and their inferences deduced from them, so long as they stated as facts only the truth, and as opinions and inferences therefrom only honest belief. The fault here, if there be one, is that opinions and inferences were not stated as such, but as facts. The defendants sought to justify the statement made, viz. that the plaintiff championed measures opposed to the moral interests of the community, by proving that he supported the two measures stated. To the minds of some, that would be sufficient to establish the truth of the charge. Others would think otherwise. It is manifest, therefore, that we cannot say, as a legal proposition, that the undisputed testimony establishes the truth of the broad charge. Evidently the learned circuit judge took this view.

It is evident that the acts proved were sufficient to induce in the minds of some the opinion that plaintiff had supported measures opposed to the moral interests of the community. The judge therefore instructed the jury that such persons were privileged to say so, and directed a verdict for defendants. But, admitting that they were privileged to express their opinions concerning certain acts, was this what was done? Did they not go further, and do more? They did not state what measures were supported, and their opinions of that particular conduct, but said generally and unqualifiedly, as a fact, that the plaintiff had arrayed himself against the moral interests of the community, which, if true, should discredit him with any voter who should believe the statement. It appealed alike to all classes—those who should look upon the legislation proven as not opposed to the moral interests of the community as well as those holding contrary views; and it afforded no one an opportunity to judge whether the statement was a proper deduction from the facts upon which it

was based or not. If one states that a candidate is a thief without qualification, he communicates a fact pertaining to his fitness; but it is a slander, if untrue, whether it was made in good faith or not, although, had he stated the exact facts, and expressed the opinion that they amounted to stealing, though they did not technically constitute the offense of larceny, the communication might be privileged.

The difficulty in this case is that the defendants have been permitted to limit their statement by proof of their intended meaning, while the writing itself contained no hint of limitation. The case of *Ellis v. Whitehead*, 95 Mich. 115, 54 N. W. 757, is in point. It was there said: "The fourth request should not have been given. It makes the slander depend entirely upon the intention of the defendant, and, in effect, says that vituperation is not slander when provoked, though it transcend the bounds of truth and propriety. It is going sufficiently far to say that a person may without liability call another a thief under circumstances which show he does not mean it. To hold that he could do so in the absence of qualifying circumstances, and shelter himself behind a provocation, real or imaginary, adequate or inadequate, would carry the rule much too far. In actions for defamation it is immaterial what meaning the speaker intended to convey. He may have spoken without any intention of injuring another's reputation; but, if he has in fact done so, he must compensate the party. He may have meant one thing and said another. If so, he is answerable for so inadequately expressing his meaning. * * * Slander, like other wrongs, is actionable, because injurious; and, while intention may have much to do with the question of damages, it is not necessarily involved in the question of guilt." We are of the opinion that the court erred in saying that the words were privileged. Not being privileged, it should have been left to the jury to say whether the evidence showed that plaintiff's support of these measures was opposed to the moral interests of the community as a matter of fact; in other words, to determine the truth of the charge.

It is hardly necessary to cite authorities in support of the doctrine that a candidate for office has a right of action for aspersions upon his character, and cannot be subjected to unwarranted and untruthful charges. In New York no distinction seems to be made between a public man and a private citizen. *Lewis v. Few*, 5 Johns. 1; *Root v. King*, 7 Cow. 613; *King v. Root*, 4 Wend. (N. Y.) 113, 21 Am. Dec. 102; *Hamilton v. Eno*, 81 N. Y. 116. A leading case will be found in *Com. v. Clap*, 4 Mass. 163, 3 Am. Dec. 212. See, also, *Curtis v. Mussey*, 6 Gray, 261; *State v. Schmitt*, 49 N. J. Law, 579, 9 Atl. 774; *Hunt v. Bennett*, 19 N. Y. 173; *Pierce v. Ellis*,

6 Ir. C. L. 55; *Simpson v. Downs*, 16 Law T. R. (N. S.) 391; *Duncombe v. Daniell*, 8 Car. & P. 222. In this last case Lord Denman said: "However large the privilege of electors may be, it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate." *Bailey v. Publishing Co.*, 40 Mich. 254; *Bronson v. Bruce*, 59 Mich. 467, 26 N. W. 671; *Wheaton v. Beecher*, 66 Mich. 310, 33 N. W. 503; *Belknap v. Ball*, 83 Mich. 587, 47 N. W. 674, 11 L. R. A. 72, 21 Am. St. Rep. 622; *Wolff v. Smith*, 112 Mich. 360, 70 N. W. 1010; *Austin v. Hyndman*, 119 Mich. 615, 78 N. W. 663; *Clifton v. Lange*, 108 Iowa, 472, 79 N. W. 276; *Field v. Magee*, 122 Mich. 556, 81 N. W. 354. The court excluded all proof in relation to the "Pink Circular" upon the ground that it was not libelous. After charging that Burch is a self-avowed candidate for the liquor dealers, and desires to go to the Legislature to work in the interest of saloons, that he edits a scurrilous newspaper, that he is the champion of saloon lawlessness and vulgar theaters, and quoting at length from his writings, as already shown, the pink circular concludes as follows, viz.: "For reasons which we consider equally as good, we ask you to vote against Henry Eikhoff." The count alleges under innuendoes that the meaning of this circular was that the plaintiff was an indecent and immoral man, and equally as unworthy of support as Burch. We are of the opinion that this comparison with Burch cannot mean less than that the plaintiff was a man as unworthy of support as Burch, for reasons not given, except as they may be implied by the charges made against Burch. Some of the charges against Burch were libelous per se; e. g. that he is the champion of saloon lawlessness and vulgar theaters. Thus the pink circular itself furnishes implications, throwing light upon the meaning of the words used about plaintiff, and justifying the claim made, viz. that he was represented to be a man of bad morals, and unworthy of support for that reason. We think this also was libelous per se, and should have been admitted, leaving the defendants to prove the truth of the charge.

The judgment is reversed, and a new trial ordered.¹⁴

¹⁴ Grant and Moore, JJ., dissented in an opinion which is omitted. The decision is that jury should not have been directed to find a verdict for the defendant, since the statements were libelous statements of fact, and the question of their truth should have been submitted to the jury.

See, further emphasizing the distinction between comment upon facts and misstatements of fact, *Davis v. Shepstone*, 11 App. Cas. 187 (1886); *Merivale v. Carson* (1887) L. R. 20 Q. B. D. 275 (statement that play founded on adultery); *Parsons v. Age-Herald Pub. Co.*, 181 Ala. 439, 61 South. 345 (1913); *Burt v. Advertiser Newspaper Co.*, 154

STAR PUB. CO. v. DONAHOE.

(Supreme Court of Delaware, 1904. 58 Atl. 513.)

NICHOLSON, CH.¹⁵ This was an action on the case in the Superior Court for New Castle county, brought by John P. Donahoe, plaintiff below, to recover damages for a publication alleged to be a libel upon the plaintiff, consisting of an article published September 2, 1900, in the *Star*, a newspaper published in the city of Wilmington by the defendant company. The plaintiff's declaration, with innuendoes, contained three counts. The defendant pleaded the general issue and five separate pleas to each of said counts. The plaintiff demurred to each of said special pleas, and for reasons assigned in an opinion delivered by Judge Boyce, the court sustained the demurrer to each of said special pleas. *Donahoe v. Star Pub. Co.*, 3 Pennewill, 545, 53 Atl. 1028. Afterwards the case came to trial at the February term, 1903, in the Superior Court for New Castle county, the plaintiff [defendant] having pleaded no matter in justification, but only the general issue, and the trial resulted in a verdict of guilty with damages for the plaintiff for \$700, upon which verdict judgment was entered, and a writ of error taken.

The article alleged to be libelous is as follows:

"Donahoe Should be Defeated.

"We trust that the Democratic voters of the Fourth Representative District of this city will not make it necessary for us to further expose the treachery of John P. Donahoe with respect to his action at Dover last winter, on the last

Mass. 238, 28 N. E. 1, 13 L. R. A. 97 (1891); *Putnam v. Browne*, 162 Wis. 524, 155 N. W. 910, Ann. Cas. 1918C, 1085.

"The right of the defendant was not to make false statements of fact, because the subject-matter was of public interest, but only to criticize, discuss, and comment upon the real acts of the plaintiff and the consequences likely to follow from them, or upon any other aspect of the case in a reasonable way. This may be done with severity. Ridicule, sarcasm, and invective may be employed. But the basis must be a fact, and not a falsehood." *Hubbard v. Allyn*, 200 Mass. 166, 170, 86 N. E. 356 (1908).

"The interest of private citizens in public affairs requires freedom of discussion rather than immunity in the statement of facts. * * * Discussion, as the term implies, is comment upon given facts; it is the expression of opinion by way of inference or conclusion from established facts. In its broadest aspect it is the judgment of acts and things from appearances. As such, its legal justification depends, not upon its truth in fact, but upon its 'fairness' as a deduction from the premises of fact upon which it is based." *Freedom of Discussion*, 23 Harv. Law Rev. 413, 415, by Van Vechter Veeder.

¹⁵ Parts of the opinion are omitted.

day of the legislative session. Nor do we wish to speak further of his ridiculous 'war record,' unless we are compelled to do so. We cannot believe that the Democrats of the Fourth will so far forget their own interests and those of their party as to again confide them to the keeping of a man who has more than once proven false to the faith reposed in him, and who is even now suspected of having made a bargain with Addicks for assistance in securing his return to the Legislature, where he will be expected to cast his vote for the gas man for United States Senator. Only the fear of bodily harm prevented Donahoe, at the last session of the General Assembly, from joining the ranks of Farlow, Clark, and King in a consummation of the disgraceful conspiracy by which a seat in the highest legislative body of the nation was to be handed over for so much cash in hand. Not having the courage to face the storm of protest and denunciation which he saw had been evoked by the votes of the other renegades, he resorted to the flimsy trick of feigning sickness, and made repeated efforts to leave the House at the most critical stage of the proceedings, in the hope of thus giving his purchaser the benefit of at least half a vote by his absence. That he was not permitted to do even this much for his master was due entirely to the determined stand taken by a few wrathful Democratic citizens, who went upon the floor of the House and compelled him by force to remain in his seat. Do our Democratic friends of the Fourth want to take the risk of having this scene repeated at the next senatorial election? Do they want to send a man to Dover who needs a body guard to prevent him from betraying them to the enemy? Do they want to trust their legislative interests to one who sells them out and cravenly deserts his post on the pretense that he's got the bellyache? These charges against Donahoe have been made time and again, publicly and privately, by reputable citizens and good Democrats. He has never attempted to deny them, and in his cringing silence we read an abject confession of his guilt. And yet this man, steeped in the mire of a foul conspiracy against his own party and against public decency, has the hardihood to again offer himself to the voters of his district as a fit person to be intrusted with the honorable and responsible duties of a legislator! It would be a disgrace to the Democratic voters of the Fourth District, a disgrace to their party, and a lasting disgrace to Delaware, to send a man of Donahoe's character to represent any respectable community in the General Assembly. Surely the Fourth District has within its limits many Democrats of ability whose hands are not soiled by the slime of Addicks' money, and who would be willing

to serve their neighbors in a public capacity. Either of the two other candidates for nomination would, we believe, make a capable and worthy representative, and there ought to be no question as to the success of one or the other of them at the nomination election next Saturday."

The plaintiff proved publication; that he was a representative in the Legislature from the Fourth District in 1899, and was a candidate for renomination by the Democratic party in September, 1900, at the time of the publication of the alleged libelous article. The plaintiff also introduced, as tending to show express malice, testimony in regard to interviews between himself and Jerome B. Bell, editor of the Star, and admitted to be the writer of the alleged libelous article, to the effect that said Bell had solicited the plaintiff to support a bill which the said Bell had presented to the Legislature, trying to buy his support; that the plaintiff had indignantly spurned his offer and refused to support the bill. Plaintiff also introduced several defamatory articles relating to him which were published in the Star prior to September 2, 1900.

The general issue being the only plea, proof of the truth of the charge was not admissible at the trial of the cause as a bar to the action; nor was it denied by the defendant below that the language used was libelous per se, and charged the commission of a crime. Testimony was admitted on the part of the defense which it contended proved that the facts and circumstances under which the defamatory matter was published were such as freed the defendant from the liability that would otherwise be imposed upon it, and made the publication "qualifiedly privileged." Then the defense prayed the court, in substance, as shortly stated in the brief of its counsel, "to charge the jury that the publication complained of, under the circumstances as detailed by the testimony, was a privileged communication, and that if the defendant did not make the publication maliciously, they should find a verdict for the defendant." * * *

It appears from the foregoing that but one question is before this court, and that is in reference to the correctness of that portion of the charge of the learned Chief Justice in the court below, already quoted, where he says: "It therefore seems to be clear that false allegations of fact, charging a candidate for office with a criminal offense, are not privileged, and, if the charges are false, good faith and probable cause are no defense. In such cases the publisher of the libel takes his own risk, and can justify only by proving the truth of the charge." Counsel on both sides have recognized this to be the sole point at issue, and to this alone have their

arguments been directed. This question comes now for the first time before a court of law in this state for a decision. Its determination one way or another involves consequences of the gravest public importance, far-reaching and difficult to anticipate. It has been argued by counsel in the cause with an ability and thoroughness, adequate to its importance, and every member of the court has devoted to its examination and consideration an amount of time and labor rarely given to a single cause.

Upon a cursory examination there appears to be great confusion and contradiction in the immense mass of authorities dealing with the general subject of "privilege" in actions of libel. And it must be admitted that in some of the adjudged cases not a little confusion of thought and lack of adequate consideration is apparent. On the whole, however, careful study and analysis will reveal the harmony actually existing between the well-considered cases, both English and American, and will prove that the development of the law of libel, even in that part of it which concerns the doctrine of privilege, called by Mr. Justice Daniel "the exceptions" (*White v. Nicholls et al.*, 3 How. 286, 11 L. Ed. 591), has been symmetrical, although gradual. It is interesting and instructive to note how closely the great English and great American judges for more than three-quarters of a century have followed out the same line of reasoning, and made application of conclusions that differ only as the circumstances of the two countries differ. And although there are, of course, some contradictory cases—some courts that have applied the accepted principles differently—yet the weight of authority on one side of the specific question before us is overwhelming.

The great underlying principle upon which the doctrine of privileged communications rests is public policy; and, as said by Judge Taft in the case of *Post Publishing Company v. Hallam*, 59 Fed. 540, 8 C. C. A. 201, "The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed." This broad principle of public advantage—the good of the community at large—has undoubtedly been the main guide for the courts in the development of this doctrine, really a doctrine of exceptions; but a more specific principle, one almost invariably alluded to in the cases, is stated by Chief Justice Shaw in *Bradley v. Heath*, 12 Pick.

164, 22 Am. Dec. 418, decided in 1831, as follows. He says: "Where words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith, and in the belief that it comes within the discharge of that duty, or where they are spoken in good faith to those who have an interest in the communication, and a right to know and act upon the facts stated, no presumption of malice arises from the speaking of the words; and therefore no action can be maintained in such cases without proof of express malice." Citing *Bromage v. Prosser*, 4 B. & C. 247, and *Starkie on Slander*, 200. Again, in *Harrison v. Bush*, 5 Ellis & B. 348, decided in 1855, this specific principle is expressed by Chief Justice Campbell. He says: "During the argument a legal canon was propounded for our guidance by the plaintiff's counsel, and this we are willing to adopt, as we think it is supported by the principles and authorities upon which the doctrine of privileged communications rests. A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contained criminating matter, which, without privilege, would be slanderous and actionable." This canon correctly expresses a guiding principle, and appears in innumerable cases with immaterial variation in phraseology, but it cannot be applied correctly unless there is applied with it the other principle we have quoted from Judge Taft, which also appears in a host of cases. * * *

There is no dispute or confusion in the arguments of counsel concerning the legal effect of the pleadings as above stated, and counsel for the plaintiff in error stated its contention of privilege, in their brief, as follows: "In a case like the present one, where the publication was in a newspaper which circulated among those persons who had a right to vote for or against the plaintiff at a time when an incompetent and unfaithful candidate could be defeated in his canvass for election, then the relation of such newspaper to the public is one which takes the case out of the general rule, and imposes proof of express malice on the plaintiff. When, therefore, we speak of the publication as privileged, we simply mean that the circumstances in which they are used rebut the inference which would otherwise arise from their utterance, or, in other words, that, when their privileged character is established as a matter of law, the burden is cast upon the plaintiff of establishing, as a matter of fact, the existence of express malice." Thus has the plaintiff in error (the defendant below) presented its case to this court.

There is no authority in our own state upon the question before us. *Rice v. Simmons*, 2 Har. 309, 413, 31 Am. Dec. 766, we do not consider applicable. But out of the great mass of cases cited by counsel from other jurisdictions, both English and American, there are a number bearing directly upon the question we are called upon to determine, and many of them show careful consideration and thorough examination of the authorities, as well as a vigorous grasp of the whole subject.

Judge Taft, in the case of *Post Publishing Company v. Hallam*, 59 Fed. 539, 8 C. C. A. 201, delivered an opinion which we quote at great length, for the authorities cited and reviewed by him are for the most part those which we would necessarily cite, and the case is almost identical with the case at bar, as are the arguments of counsel in both cases. It can be distinguished from the case before us in only one respect, and that is that in the case at bar the question is whether false or untruthful allegations of fact, charging a candidate for office with a criminal offense, are privileged, while in the case before Taft the question was broader, and included false allegations of fact—that the candidate had committed disgraceful acts, whether criminal or not. The case was decided by the Circuit Court of Appeals December 9, 1893, by Taft and Lurton, Circuit Judges, and Ricks, District Judge. Taft, J., delivered the opinion of the court:

“Finally we come to those assignments of error which are based on the charge of the court in regard to privileged communications. The court in effect told the jury that the article in question, relating, as it did, to a matter of public interest, came within a class of communications that were conditionally privileged; that the public acts of public men (and candidates for office were public men) could be lawfully made the subject of comment and criticism, not only by the press, but also by all members of the public, for the press had no higher rights than the individual, but that while criticism and comment, however severe, if in good faith, were privileged, false allegations of fact (as, for instance, that the candidate had committed disgraceful acts) were not privileged; and that, if the charges were false, good faith and probable cause were no defense, though they might mitigate damages. Counsel for the plaintiff in error and the defendant below has argued with great vigor, and an array of authorities, that we ought not to adopt the view of the circuit court upon this important question, but should hold that the privilege extends to statements of fact as well as comment.

“The argument is this: Privileged communications comprehend all bona fide statements in performance of any duty,

whether legal, moral, or social, even though of imperfect obligation, when made with a fair and reasonable purpose of protecting the interest of the person making them, or the interest of the person to whom they are made. Townsh. Sland. & L. 209. It is of the deepest interest to the public that they should know the facts showing that a candidate for office is unfit to be chosen. Therefore every one who has reasonable ground for believing, and does believe, that such a candidate has committed disgraceful acts affecting his fitness for the office he seeks, should have the right to give the public the benefit of his information, without making himself liable in damages for untrue statements, unless malice is shown. Though of imperfect obligation, it is said to be the highest duty of the daily newspaper to keep the public informed of facts concerning those who are seeking their suffrages and confidence. Can it be possible, it is asked, that public policy will make privileged an unfounded charge of dishonesty or criminality against one seeking private service, when made to the private individual with whom service is sought, and yet will not extend the same protection to him who in good faith informs the public of charges against applicants for service with them? Is it not at least as important that the high functions of public office should be well discharged, as that those in private service should be faithful and honest?

“The *a fortiori* step in this reasoning is only apparent. It is not real. The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. Where conditional privilege is extended to cover a statement of disgraceful fact to a master concerning a servant or one applying for service, the privilege covers a *bona fide* statement, on reasonable ground, to the master only, and the injury done to the servant's reputation is with the master only. This is the extent of the sacrifice which the rule compels the servant to suffer in what was thought to be, when the rule became a law, a most important interest to society. But if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground.

"We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good. We are aware that public officers and candidates for public office are often corrupt, when it is impossible to make legal proof thereof, and, of course, it would be well if the public could be given to know in such a case what lies hidden by concealment and perjury from judicial investigation. But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are in fact true, but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold. No one reading the newspaper of the present day can be impressed with the idea that statements of fact concerning public men, and charges against them, are unduly guarded or restricted, and yet the rule complained of is the law in many of the states of the Union and in England.

"In *Davis v. Shepstone*, 11 App. Cas. 187, Lord Chancellor Herschell delivered the judgment of the judicial committee of the Privy Council in an appeal from a judgment for libel recovered in the Supreme Court of Natal. The plaintiff below was a resident commissioner of Great Britain in Zululand, and the alleged libel charged him with having committed unprovoked and altogether indefensible assaults upon certain Zulu chiefs. The publication was made in the colony of Natal, where the conduct of the resident commissioner in Zululand was of great public interest. It was claimed that the article was conditionally privileged, and that the plaintiff ought to have succeeded only on proof of express malice. This claim was denied. The Lord Chancellor thus stated the law: "There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all the members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticize, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. In the present case the appellants, in the passages which were complained of as libelous, charged the respondent, as now appears, without foundation, with having been guilty of specific acts of misconduct, and then proceeded, on the assumption that the

charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious. Not only so, but they themselves vouched for the statements by asserting that, though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their lordships' opinion, there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege.'

"Other English cases laying down the same doctrine are *Campbell v. Spottiswoode*, 3 Frost & F. 421, 432, affirmed 3 Best & S. 769, and *Popham v. Pickburn*, 7 Hurl. & N. 891, 898. The latest American case, and the most satisfactory, is that of *Burt v. Newspaper Co.*, 154 Mass. 238, 242, 28 N. E. 1 [13 L. R. A. 97], where Justice Holmes discusses the question, and quotes with approval the foregoing passages from the judgment of *Davis v. Shepstone*. Other American cases approving the same rule are *Smith v. Burrus*, 106 Mo. 94, 101, 16 S. W. 881 [13 L. R. A. 59, 27 Am. St. Rep. 329]; *Wheaton v. Beecher*, 66 Mich. 307, 33 N. W. 503; *Bronson v. Bruce*, 59 Mich. 467, 26 N. W. 671 [60 Am. Rep. 307]; *Brewer v. Weakley*, 2 Overt. 99 [5 Am. Dec. 656]; *Sweeney v. Baker*, 13 W. Va. 183 [31 Am. Rep. 757]; *Hamilton v. Eno*, 81 N. Y. 126; *Rearick v. Wilcox*, 81 Ill. 77; *Negley v. Farrow*, 60 Md. 158, 176 [45 Am. Rep. 715]; *Jones v. Townsend*, 21 Fla. 431, 451 [58 Am. Rep. 676]; *Banner Pub. Co. v. State*, 16 Lea, 176 [57 Am. Rep. 216]; *Publishing Co. v. Moloney* (Ohio) 33 N. E. 921; *Seely v. Blair*, *Wright* (Ohio) 358, 683; *Wilson v. Fitch*, 41 Cal. 383; *Edwards v. Publishing Co.* (Cal.) 34 Pac. 128 [37 Am. St. Rep. 70]; *State v. Schmitt*, 49 N. J. Law, 579, 586, 9 Atl. 774; *Eviston v. Cramer*, 57 Wis. 570, 15 N. W. 760.

"In *Publishing Company v. Moloney*, *supra*, the Supreme Court of Ohio say, with reference to the doctrine that statements of fact should be regarded as privileged when made concerning a candidate for an office, as follows: 'We do not think the doctrine either sound or wholesome. In our opinion, a person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character, than he does his private property. Remedy, by due course of law, for injury to each, is secured by the same constitutional guaranty, and the one is no less inviolable than the other. To hold otherwise would, in our judgment, drive reputable men from public positions, and fill their places with others having no regard for their reputation, and thus defeat the purpose of the rule contended for, and overturn the reason upon which it is sought to sustain

it. That rule has not been generally adopted in this country, and the converse of it has hitherto obtained in this state.'"

From the opinion of the court in *Upton v. Hume*, 24 Or. 431, 33 Pac. 812, 21 L. R. A. 493, 41 Am. St. Rep. 863—a case precisely in point, and decided in 1893—we quote as follows: "The rule we gather from the authorities is that the fitness and qualification of a candidate for an elective office may be a subject for the freest scrutiny and investigation, either by the proprietor of a newspaper, or by a voter or other person having an interest in the matter, and that much latitude must be allowed in the publication, for the information of voters, of charges affecting the fitness of a candidate for the place he seeks, so long as it is done honestly and without malice. Nor will such publication be actionable, without proof of express malice, although it may be harsh, unjust, and unnecessarily severe, for these are matters of opinion, of which the party making the publication has a right to judge for himself. In the case of such a publication the occasion rebuts the inference of malice which the law would otherwise raise from its falsity, and no right of action exists, even though the character of the party has suffered, unless he is able to show the existence of actual malice. But when the publication attacks the private character of a candidate by falsely imputing to him a crime, it is not privileged by the occasion, either absolutely or qualifiedly, but is actionable per se, the law implying malice; and it is no justification that the publication was made with an honest belief in its truth, in good faith, and for the purpose of influencing voters. Such publications can be justified only by proof of their truth. *Commonwealth v. Clap*, 4 Mass. 163, 3 Am. Dec. 212; *Curtis v. Mussey*, 6 Gray, 261; *Aldrich v. Press Printing Co.*, 9 Minn. 133 (Gil. 123), 86 Am. Dec. 84; *Root v. King*, 7 Cow. 613; *King v. Root*, 4 Wend. 113, 21 Am. Dec. 102; *Hamilton v. Eno*, 81 N. Y. 116; *Commonwealth v. Wardell*, 136 Mass. 164; *Barr v. Moore*, 87 Pa. 385, 30 Am. Rep. 367; *Seely v. Blair*, *Wright (Ohio)* 358. If it can be said that the cases of *Bays v. Hunt*, 60 Iowa, 251, 14 N. W. 785, *Mott v. Dawson*, 46 Iowa, 533, and *State v. Balch*, 31 Kan. 465, 2 Pac. 609, when read in the light of the facts, announce a contrary doctrine, they do not seem to us to be supported either by reason or the weight of authority."

The New York cases are strong, clear, and harmonious in support of the cases quoted above, and we would refer especially to the discussions and quotations contained in the early cases of *Lewis v. Few*, 5 Johns. 1, and *Root v. King*, 7 Cow. 613, affirmed on error brought in 4 Wend. 113, 21 Am. Dec. 102.

Chief Justice Folger, in the latest conspicuous New York case (*Hamilton v. Eno*, 81 N. Y. 126), disregards entirely the distinction made by counsel for the plaintiff in error between an official and a candidate for office, and evidently considers the analogy between a candidate for public office, seeking the suffrages of the electors, and a servant seeking employment, to be too feeble to furnish a basis for legal action. The differences between the two situations, and the differences between the audiences to which a defamatory charge would be addressed in either case, are manifestly too great and too fundamental to permit such an analogy to be pressed successfully. The robust common sense that has marked the development of the common law cannot be effectively influenced by an analogy so remote and so rhetorical. Folger says in *Hamilton v. Eno*, *supra*: "Now, one may in good faith publish the truth concerning a public officer, but, if he states that which is false and aspersive, he is liable therefor, however good his motives. A person in public office is no less to be protected than one who is a candidate for public office, and the law of libel must be the same in each case. The public have as much interest in knowing the true character of one seeking a place of trust as that of one who holds it. There must be as much and no more privilege of utterance as to one than the other. Yet it is the law of this state that to accuse a candidate for public office of an offense is not privileged, though the charge was made without evil motive and in the exercise of a political right (*Lewis v. Few*, 5 Johns. 1), and though the libel relate to a public act of the candidate in his official place (*Id.*; *Root v. King*, 7 Cow. 613, affirmed on error brought in 4 Wend. 113 [21 Am. Dec. 102]). It cannot be different when the charge is against one holding an office. See *Edsall v. Brooks*, 17 Abb. Pr. 221. So it seems to be in the other states. *Com. v. Clap*, 4 Mass. 163 [3 Am. Dec. 212]; *Curtis v. Mussey*, 6 Gray, 261; *Seely v. Blair*, Wright (Ohio) 358, 683; *Brewer v. Weakley*, 2 Overt. (Tenn.) 99 [5 Am. Dec. 656]; *Mayrant v. Richardson*, 1 Nott & McC. (S. C.) 347 [9 Am. Dec. 707]."

The Massachusetts cases, are equally clear and harmonious. Taken together, they are most discriminating and instructive concerning the whole doctrine of privilege. They are freely cited in the cases quoted above. *Burt v. Newspaper Advertising Company*, 154 Mass. 242, 28 N. E. 1, 13 L. R. A. 97, is the latest case, and is extensively quoted by Judge Taft, as we have already seen. We would also refer especially to the Maryland case of *Negley v. Farrow*, 60 Md. 176, 45 Am. Rep. 715, and the Michigan case of *Bronson v. Bruce*, 59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307, and the Florida

case of *Jones et al. v. Townsend*, 21 Fla. 431, 58 Am. Rep. 676.

It is unnecessary, however, to cite authorities further. Nearly all are cited in the cases we have already quoted. It is sufficient to say that the weight of authority in general is overwhelmingly on the side of the propositions, and the argument in support of them, quoted above from the opinion of Judge Taft in *Post Publishing Co. v. Hallam*, while the sustaining cases are even more remarkable for adequate research and a vigorous grasp of the subject than for their numbers. The opposing cases, however, are really not numerous, there being but very few outside of the Iowa and Kansas cases referred to so disparagingly in *Upton v. Humes*, supra, and *Briggs v. Garrett*, 111 Pa. 404, 2 Atl. 513, 56 Am. Rep. 274. The latter case is the one most relied upon by the plaintiff in error, and is quoted very generally. It is a question, however, whether the facts and circumstances in that case do not place it in a class of cases other than the one at bar—a class to which we propose briefly to refer; and therefore, even were its logic convincing—and we think it the reverse—it might still be discriminated from the case at bar. The libel in that case consisted of a letter received by the defendant making charges against Judge Briggs, and the publication consisted in his reading it to the committee of one hundred assembled in a meeting open to the public, the so-called committee of one hundred being a well-known organization for a distinct public purpose. The South Dakota cases upon which much stress is laid by counsel for plaintiff in error appear to be based by the South Dakota courts expressly upon a provision in the Constitution of South Dakota. Vide *Ross v. Ward*, 85 N. W. 183, 86 Am. St. Rep. 746.

Many cases have been cited and discussed by counsel on both sides that deal with facts and circumstances which place them in classes differing greatly from that of the case at bar, so that they are concerned with other applications of the doctrine of privilege. In treating a subject which requires such nice discrimination, and such careful distinctions in the application of accepted principles, it is easy to perceive that confusion is constantly created by applying language properly used in one class of cases as authority for the decision of another class. I refer more especially to the numerous cases relating to the publication of reports of proceedings of legislative, judicial, and semijudicial bodies containing matter defamatory of individuals, and also to those cases that are concerned with charges made to the appointing or supervising power for the purpose of securing the discipline or removal of

a subordinate official. A large proportion of the cases cited by counsel belong to one or another of these classes. * * *

Of the cases cited which involved strictly private and unofficial relations, such as those between employers in regard to servants or employés, the well-known starting point of qualifiedly privileged communications, and between members of a family with regard to persons seeking marriage, there is obviously no occasion to speak, for that branch of the doctrine of privilege has been too long settled and is too well understood.¹⁶

This laborious review of the authorities leaves no doubt in our mind that it would be unsound in principle, unwarranted by precedent, and contrary to public policy to hold that allegations of fact charging a candidate for office with a criminal offense are in any way privileged. If allegations of fact charging a candidate for office with a criminal offense are false or untrue (in the case at bar it is admitted by the pleadings that the charges of crime contained in the alleged libel are false or untrue), then good faith and probable cause are not a defense to the action. In such case the publisher of a libel takes his own risk, and can justify only by pleading specially and proving the truth of the charge. If the case at bar required us to go further than this, and we were asked to hold that no allegations of fact charging a candidate with disgraceful acts, whether criminal or not criminal, are privileged, as do many of the cases cited, we might deem it necessary to extend the discussion further, and analyze the whole subject exhaustively, but such is not the case. We are entirely agreed that this opinion should not embrace any question not

¹⁶ The following are typical cases of conditional privilege: *Child v. Affleck*, 9 Barn. & C. 403 (answer to inquiry concerning character of prospective servant; the answer contained a false but honest imputation against the servant's character; held, defendant not liable in action by servant); *Erber v. Dun* (C. C.) 12 Fed. 526 (answer by commercial agency to request for report on financial standing of prospective creditor of inquirer); *Adams v. Coleridge*, 1 T. L. R. 84 (statement by a brother to his sister concerning the character of the sister's suitor). Also, see the following illustrations of the same principle: *Coxhead v. Richards* (1846) 2 C. B. 569 (statement volunteered by defendant to owner of ship that captain during the voyage was habitually intoxicated; the statement, though false, was held to be privileged, since it was made to protect human life); *Harrison v. Bush*, 5 El. & Bl. 344 (statement by residents of certain community to plaintiff's superior in office who had the power of removal, to the effect that the plaintiff, as a magistrate, had failed to preserve peace).

When it is said that such statements are conditionally or qualifiedly privileged, it is meant that the declarant must have acted in good faith and with an honest belief in the truth of his statements. In some states it is also required that he must have had reasonable grounds for such belief.

actually before us, and therefore we consider further discussion unnecessary.

We think that there was no error in the rulings or charge of the learned Chief Justice, and therefore the judgment of the court below is affirmed.¹⁷

COLEMAN v. MacLENNAN.

(Supreme Court of Kansas, 1908. 78 Kan. 711, 98 Pac. 281, 20 L. R. A. [N. S.] 361, 130 Am. St. Rep. 390.)

BURCH, J.¹⁸ In August, 1904, the plaintiff held the office of Attorney General of the state and was a candidate for reelection at the general election, which occurred in the following November. By virtue of his office, he was a member of the commission charged with the management and control of the state school fund. The defendant was the owner and publisher of the Topeka State Journal, a newspaper published at Topeka, and circulated both within and without the state. In the issue of August 20, 1904, appeared an article purporting to state facts relating to the plaintiff's official conduct in connection with a school fund transaction, making com-

¹⁷ The decision is for the plaintiff. This case is supported by the decided weight of authority. See *Post Pub. Co. v. Hallam*, 59 Fed. 530, 8 C. C. A. 201 (a leading case); *Rearick v. Wilcox*, 81 Ill. 77; *Bronson v. Bruce*, 59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307; *Upton v. Hume*, 24 Or. 420, 33 Pac. 810, 21 L. R. A. 493, 41 Am. St. Rep. 863; "Defamation of a Public Officer in a Newspaper," 57 Am. Law Reg. 469. And see an exhaustive note in *Pattangall v. Mooers*, 113 Me. 412, 94 Atl. 561, in L. R. A. 1918E, 21 (Ann. Cas. 1917D, 689).

Statute.—Code N. M. 1915, § 1725: "It is no offense [i. e., crime] to make true statements of fact, or express opinions as to the qualifications of a candidate, for any office or public place or appointment."

"The whole doctrine of immunity in defamation is based upon public policy, and the only valid objection to protecting statements of fact in relation to candidates for elective office rests upon such considerations. It is the conviction that such a doctrine would do the public service more harm than good. The danger that honorable and worthy men may be driven from politics and public service by allowing such latitude in attacks upon personal character outweighs any benefits that might accrue to the public. Such license would create a disinclination for public life on the part of honorable men by making them feel that it was incompatible with wholesome self-respect and decent reputation; it would drive men of sensibility away from its opportunities in sheer disgust, and leave public employment to callous and self-seeking adventurers. It seems plain that immunity in fair comment extends the utmost protection in matters of public interest that is compatible with a proper regard for personal rights." *Van Vechten Veeder*, in 23 *Harvard Law Rev.* 413, at page 419.

¹⁸ Parts of the opinion are omitted.

ment upon them and drawing inferences from them. Deeming the article to be libelous, the plaintiff brought an action for damages against the defendant, alleging that the matter published concerning him was false and defamatory, and that its publication was the fruit of malice. Among other defenses the defendant pleaded facts which he claimed rendered the article and its publication privileged. * * *

The jury found generally for the defendant. A motion for a new trial was denied, and the plaintiff prosecutes error [i. e., carries the case to the supreme court]. The plaintiff claims that the court committed grievous error in its instructions to the jury and by refusing to instruct according to the plaintiff's requests; the instruction upon the subject of privilege being attacked with especial fervency. * * *

Beyond their importance to the immediate parties, the questions raised are of the utmost concern to all the people of the state. What are the limitations upon the right of a newspaper, to discuss the official character and conduct of a public official who is a candidate for re-election by popular vote to the office which he holds? * * * Where the public welfare is concerned, the individual must frequently endure injury to his reputation without remedy.

In some situations an overmastering duty obliges a person to speak, although his words bring another into disrepute. Such is the case of a witness testifying to relevant facts in court. Reasons of public policy forbid that the question of malice in his mind should be investigated, and the communication he makes, although damaging in the extreme, is absolutely privileged. He may be prosecuted for perjury, but a civil action based upon his statements is not permitted. "A man may be defamed by an unjust removal from office on unfounded charges, by injurious testimony given in courts of justice, by the unwarranted deductions of counsel in presenting his case adversely to the jury, and in many other ways where notwithstanding the agent in the injury was wholly free from legal fault. Thus a great public character may perhaps suffer in reputation all his lifetime from an impeachment for an offense never in fact committed; yet if the impeachment was instituted in good faith, and on grounds apparently sufficient, those concerned in it only performed a public duty. We unhesitatingly recognize the fact that in many cases, however damaging it may be to individuals, there should and must be legal immunity for free speaking, and that justice and the cause of good government would suffer if it were otherwise. With duty often comes a responsibility to speak openly and act fearlessly, let the consequences be what they may; and the party upon whom the duty was imposed must

be left accountable to conscience alone, or perhaps to a supervising public sentiment, but not to the courts." Cooley, *Torts* (2d Ed.) 246.

In other situations there may be an obligation to speak, which, although not so imperative, will under certain conditions prevent the recovery of damages by a party suffering injury from the statements made. There are social and moral duties of less perfect obligation than legal duties which may require an interested person to make a communication to another having a corresponding interest. In such a case the occasion gives rise to a privilege qualified to this extent. Any one claiming to be defamed by the communication must show actual malice, or go remediless. This privilege extends to a great variety of subjects and includes matters of public concern, public men, and candidates for office. Under a form of government like our own there must be freedom to canvass in good faith the worth of character and qualifications of candidates for office, whether elective or appointive, and by becoming a candidate, or allowing himself to be the candidate of others, a man tenders as an issue to be tried out publicly before the people or the appointing power his honesty, integrity, and fitness for the office to be filled.

In the case of *Wason v. Walter*, L. R. 4 Q. B. 73, already cited, the question for decision was whether a report of a debate in Parliament containing matter disparaging to the character of an individual spoken in the course of debate furnished ground for an action of libel by the party whose character was called in question. The court held that it was not, and in the opinion of Mr. Chief Justice Cockburn it was said:

"The other and the broader principle on which this exception to the general law of libel is founded is that the advantage to the community from publicity being given to the proceedings of courts of justice is so great that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that, with a view to distinguish the publication of proceedings in Parliament from that of proceedings of courts of justice, it has been said that the immunity accorded to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of Parliament are not; as also that, by the publication of the proceedings of the courts, the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true ground is that given by Lawrence, J., in *Rex v. Wright*, 8 T. R. 298, namely, that, 'though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the

proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings.' In *Davidson v. Duncan*, 7 E. & B. 231 (E. C. L. vol. 90), 26 L. J. Q. B. 106, Lord Campbell says: 'A fair account of what takes place in a court of justice is privileged. The reason is that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character, is infinitesimally small as compared to the convenience of publicity.' And Wightman, J., says: 'The only foundation for the exception is the superior benefit of the publicity of judicial proceedings which counterbalances the injury to individuals, though that at times may be great.'" Page 87. Paraphrasing this language, it is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character so small that such discussion must be privileged.

The law of libel which the Constitution takes for granted gives expression to and room for the operation of these fundamental principles of public policy and the Bill of Rights must be interpreted accordingly. Section 11 of the Bill of Rights sets off the inviolability of liberty of the press from the right of all persons freely to speak, write, or publish their sentiments on all subjects, and this fact has given rise to claims on the part of newspaper publishers of special privileges not enjoyed in common by all. Whether such claims are just need not be decided in order to determine the rights of the parties to this litigation. So far they have been rejected by the courts, and the present consensus of judicial opinion is that the press has the same rights as an individual, and no more. The basis of the contention for a more liberal indulgence lies in the modern conditions which govern the collection of news items and the insistent popular expectation that newspapers will expose, and the popular demand that they shall expose, actual and suspected fraud, graft, greed, malfeasance, and corruption in public affairs and questionable conduct on the part of

public men and candidates for office without stint, leaving to the people themselves the final verdict as to whether charges made or opinions expressed were justified.

Nor is it necessary in this case to define the word "sentiments" used in section 11 of the Bill of Rights. If that word means no more than thoughts, judgments, opinions, or notions, and the section does not protect freedom to make assertions of fact, still a more liberal libel law would not violate it. The Constitution guarantees to the individual a minimum of liberty. Other law is not forbidden to secure a larger measure. There is great diversity of opinion regarding the extent to which discussions of the fitness of candidates for office may go. In England and Canada the limit is fixed at criticism and comment, which, however, may be severe, if fair, and may include the inferring of motives for conduct in fact exhibited if there be foundation for the inference. In some of our own states the rule is more liberal, while in others it is more narrow. According to the greater number of authorities, the occasion giving rise to conditional privilege does not justify statements which are untrue in fact, although made in good faith, without malice and under the honest belief that they are true. A minority allows the privilege under such circumstances. The district court instructed the jury according to the latter view, and the instruction given has the sanction of previous decisions of this court.

In the case of *Kirkpatrick v. Eagle Lodge*, 26 Kan. 384, 40 Am. Rep. 316, a report was made to a grand lodge of Odd Fellows by a special committee to which was referred a petition respecting the expulsion of a member of the order, stating that the officers of a subordinate lodge to which the petition had been presented were of the opinion that the sworn statements of the petition were infamously untrue. This report was received, adopted, published in the grand lodge journal, and distributed among the members of the order for whom it was intended. The court held that the occasion for the publication prevented the inference of malice, and afforded a qualified defense depending upon the absence of actual malice. The opinion distinguishes between absolute and qualified privilege, and says: "Under this classification which is fully sustained by the authorities, the publication complained of is only conditionally privileged, and as the averments in the petition are that the injurious publication is false and malicious, and that the defendants, well knowing its falsity, maliciously published it for the purpose of bringing the plaintiff into public scandal, infamy, and disgrace, the petition states a cause of action; but no recovery can be had thereon without proof of express malice on the part of the defendants,

though the charge imputed in the publication be without foundation." 26 Kan. 391, 40 Am. Rep. 316.

In the case of *Redgate v. Roush*, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236, two paragraphs of the syllabus read as follows: "Where the officers of a church upon inquiry find that their pastor is unworthy and unfit for his office, and thereupon, in the performance of what they honestly believe to be their duty toward other members and churches of the same denomination, publish in good faith in the church papers the result of their inquiry, and there is a reasonable occasion for such publication, it will be deemed to be privileged, and protected under the law. In such case, and where the plaintiff seeks damage, it devolves on him to establish actual malice, and, where his own testimony disproves malice, the court is justified in taking the case from the jury upon a demurrer to the evidence." In the course of the argument of the opinion it was said:

"The publication is defamatory in character, and naturally would largely deprive the plaintiff of the confidence of the members of his church organization throughout the country. If it was false in fact and maliciously made, the plaintiff is entitled to recover to the extent of the injury suffered, unless the relations of the parties and the circumstances of the case justified the publication and brought the defendants within the privilege and protection of the law. The defamatory statement was not absolutely privileged, as words spoken or written by judges, jurors, or witnesses in the course of judicial proceedings, or as in legislative debates, but it was, at most, a case of qualified privilege. Whether it was so privileged must be determined by the position occupied by the defendants, their relations to the plaintiff and to other members of the same denomination, and the circumstances under which the publication was made. If the statements were published in good faith, and in the performance of what was honestly deemed to be an official or moral duty toward other church members, and for the benefit and protection of the church organization at large, and there was a reasonable occasion for the publication, it was privileged and protected. * * * If the plaintiff was unworthy or unfit to discharge the sacred functions of his high calling, the defendants, interested in the welfare of the denomination throughout the land, would appear to have been justified in warning other members and congregations of that organization to whom the plaintiff might offer his services as pastor. If the publication was *prima facie* privileged, it devolved on the plaintiff to allege and prove that it was both false in fact and malicious in purpose."

The moral and social duty of members of a great fraternity or of a great church organization to inform their brothers of the scandalous conduct of a fellow member or one of their leaders is no higher or stronger than that of electors to keep the public administration pure by warnings respecting the character and conduct of a candidate for office; and, if false words are not actionable in one case unless published with actual malice, they are privileged to the same extent in the other. Such is the clear declaration of the court in the case of *State v. Balch*, 31 Kan. 465, 2 Pac. 609. True, that was a criminal case, but the rule of privilege is the same in both civil and criminal actions. It is the occasion which gives rise to privilege, and this is unaffected by the character of subsequent proceedings in which it may be pleaded. In *Balch's Case* a printed article making grave charges against the character of a candidate for county attorney was circulated among the voters of the county previous to the election. In the opinion holding the occasion to be privileged the court said:

"If the supposed libelous article was circulated only among the voters of Chase county, and only for the purpose of giving what the defendants believed to be truthful information, and only for the purpose of enabling such voters to cast their ballots more intelligently, and the whole thing was done in good faith, we think the article was privileged, and the defendants should have been acquitted, although the principal matters contained in the article were untrue in fact and derogatory to the character of the prosecuting witness. * * * Generally we think a person may in good faith publish whatever he may honestly believe to be true, and essential to the protection of his own interests or the interests of the person or persons to whom he makes the publication, without committing any public offense, although what he publishes may in fact not be true, and may be injurious to the character of others. And we further think that every voter is interested in electing to office none but persons of good moral character, and such only as are reasonably qualified to perform the duties of the office. This applies with great force to the election of county attorneys." 31 Kan. 472, 2 Pac. 614.

Substantially the same doctrine is the basis of the following decisions: *Mott v. Dawson*, 46 Iowa, 533; *Bays v. Hunt*, 60 Iowa, 251, 14 N. W. 785; *Marks v. Baker*, 28 Minn. 162, 9 N. W. 678; *State v. Burnham*, 9 N. H. 34, 31 Am. Dec. 217; *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 605; *Carpenter v. Bailey*, 53 N. H. 590; *Briggs v. Garrett*, 111 Pa. 404, 2 Atl. 513, 56 Am. Rep. 274; *Press Co. v. Stewart*, 119 Pa. 584, 14 Atl. 51; *Jackson v. Pittsburgh*

Times, 152 Pa. 406, 25 Atl. 613, 34 Am. St. Rep. 659; Myers v. Longstaff, 14 S. D. 98, 84 N. W. 233; Express Printing Co. v. Copeland, 64 Tex. 354; Shurtleff v. Stevens, 51 Vt. 501, 31 Am. Rep. 698; Posnett v. Marble, 62 Vt. 481, 20 Atl. 813, 11 L. R. A. 162, 22 Am. St. Rep. 126; O'Rourke v. Publishing Co., 89 Me. 310, 36 Atl. 398; Crane v. Waters (C. C.) 10 Fed. 619.

The plaintiff asks that the decisions of this court quoted above be overruled, and that they be supplanted by one which shall express the narrow conception of the law of privilege held by the majority of the courts. Kirkpatrick's Case was decided in 1881 and Balch's Case in 1884. The Redgate decision is almost 10 years old. A quarter of a century has elapsed since the doctrine of those cases was promulgated, and the Legislature, coming directly from the people year after year, has not seen fit to make any modification of it. Surely in that length of time, and in view of the repetition of the error, if any were committed, some legislative action would have been taken to safeguard the reputations of our citizens if they were unduly imperiled by those decisions. The fact that so many courts of this country, all of high character, of great learning and ability, and all equally interested in correctly solving the problems of free government, differ from us, makes us pause; but a reversal of policy and the overturning of what has been so long accepted as settled law would be tantamount under the circumstances to legislation. Such a step ought not to be urged upon the court except for conclusive reasons. What are the reasons supporting the majority rule?

The decision most freely quoted since it was rendered in 1893 and chiefly relied upon by the plaintiff here is that of the United States Circuit Court of Appeals for the Sixth Circuit in the case of Post Pub. Co. v. Hallam, 16 U. S. App. 613, 8 C. C. A. 201, 59 Fed. 530. Counsel in the case had argued from the duty of newspapers to keep the public informed concerning those who are seeking their suffrages and confidence, and had asked, if it were possible, that the privilege allowed in discussing the character of public servants should be less than that which protects defamatory statements made concerning a private servant. The opinion states **this argument**, and then proceeds as follows:

"The existence and extent of privilege in communications is determined by balancing the needs and good of society with the right of an individual to enjoy a good reputation when he has done nothing which ought to injure his reputation. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be de-

rived from it is outweighed. Where conditional privilege is extended to cover statements of disgraceful facts to a master concerning a servant or one applying for service, the privilege covers a bona fide statement on reasonable grounds to the master only, and the injury done to the servant's reputation is with the master only. This is the extent of the sacrifice which the rule compels the servant to suffer in what was thought to be, when the rule became law, a most important interest to society. But, if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with one person only, or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable grounds. We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good. We are aware that public officers and candidates for public office are often corrupt when it is impossible to make legal proof thereof, and, of course, it would be well if the public could be informed in such a case of what lies hidden by concealment and perjury from judicial investigation. But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their character outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold. No one reading the newspaper of the present day can be impressed with the idea that statements of fact concerning public men and charges against them are unduly guarded or restricted; and yet the rule complained of is the law in many of the states of the Union and in England." 16 U. S. App. 652, 8 C. C. A. 211, 59 Fed. 540.

Here the rule by which privilege is to be measured is correctly stated, as in *Wason v. Walter*, L. R. 4 Q. B. (Eng.) 73, the balance of public good against private hurt. The argument of counsel is then answered, and the statement is made that a candidate ought not suffer a loss in reputation with the whole public for the public good. That is the question to be decided, and not a reason why it should be so decided. Then the sole reason for the decision is stated—that honorable and worthy men will be driven from politics. Then the consequences of the decision are commented upon: Freedom of the press will not be endangered—an assertion, as shown by the manner

in which public men are handled by the press at the present time, an appeal to experience for proof.

The single reason upon which the Hallam decision is based is also in the nature of a prediction, and is not new. It was advanced in this country in 1808 by Mr. Chief Justice Parsons (*Commonwealth v. Clap*, 4 Mass. 163, 3 Am. Dec. 212) and by Chancellor Walworth in 1829 in the case of *King v. Root*, 4 Wend. (N. Y.) 114, 21 Am. Dec. 102. Speaking in opposition to the liberal doctrine, the chancellor said: "It is, however, insisted that this libel was a privileged communication. If so, the defendants were under no obligation to prove the truth of the charge; and the party libeled had no right to recover unless he established malice in fact, or showed that the editors knew the charge to be false. The effect of such a doctrine would be deplorable. Instead of protecting, it would destroy, the freedom of the press, if it were understood that an editor could publish what he pleased against candidates for office, without being answerable for the truth of such publications. No honest man could afford to be an editor, and no man who had any character to lose would be a candidate for office under such a construction of the law of libel. The only safe rule to adopt in such cases is to permit editors to publish what they please in relation to the character and qualifications of candidates for office, but holding them responsible for the truth of what they publish."

These predictions call to mind that of Lord Thurlow, who, when protesting against the passage of the Fox libel act, said it would result in "the confusion and destruction of the law of England." 2 May, Const. History of England, p. 122.

The actual results of the struggle ending in the enactment of that law are stated by the author cited as follows: "The press was brought into closer relations with the state. Its functions were elevated, and its responsibilities increased. Statesmen now had audience of the people. They could justify their own acts to the world. The falsehoods and misrepresentations of the press were exposed. Rulers and their critics were brought face to face, before the tribunal of public opinion. The sphere of the press was widely extended. Not writers only, but the first minds of the age, men ablest in council and debate, were daily contributing to the instruction of their countrymen. Newspapers promptly met the new requirements of their position. Several were established during this period whose high reputation and influence have survived to our own time, and, by fullness and rapidity of intelligence, frequency of publication, and literary ability, proved themselves worthy of their honorable mission to instruct the people." (2 May's Const. Hist. of Eng. 123.)

In opposition to the high authority of *King v. Root* and the *Hallam Case* may be placed *Thomas M. Cooley*, who must be reckoned with in the discussion of any question upon which he has deliberately expressed himself. Commenting on the foregoing quotation from *King v. Root*, he says: "Notwithstanding the deplorable consequences here predicted from too great license to the press, it is matter of daily observation that the press in its comments upon public events and public men proceeds in all respect as though it were privileged. Public opinion would not sanction prosecutions by candidates for office for publications amounting to technical libels, but which were nevertheless published without malice in fact; and the man who has a 'character to lose' presents himself for the suffrages of his fellow citizens in the full reliance that detraction by the public press will be corrected through the same instrumentality, and that unmerited abuse will react on the public opinion in his favor. Meantime the press is gradually becoming more just, liberal, and dignified in its dealings with political opponents, and vituperation is much less common, reckless, and bitter now than it was at the beginning of the century, when repression was more often resorted to as a remedy." *Cooley, Const. Lim.* (7th Ed.) 644n.

This statement of the results of Judge Cooley's observation is in full accord with our own local experience. Without speaking for other states in which the liberal rule applied in *Balch's Case* prevails, it may be said that here at least men of unimpeachable character from all political parties continually present themselves as candidates in sufficient numbers to fill the public offices and manage the public institutions, and the conduct of the press is as honest, clean, and free from abuse as it is in states where the narrow view of privilege obtains. The fact that the public welfare has been promoted in England by liberalizing the law of libel is freely acknowledged in *Wason v. Walter*, L. R. 4 Q. B. (Eng.) 73: "Our view of libel has in many respects only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of Parliament, on judges and other public functionaries are now made every day which half a century ago would have been the subject of actions or ex officio informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and

though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?"

Since the only reason given for the rejection of the liberal rule fails, it is pertinent to inquire if the consequences of the narrow rule are so innocuous as the Hallam Case asserts, and in doing so it must be borne in mind that the correct rule, whatever it is, must govern in cases other than those involving candidates for office. It must apply to all officers and agents of government, municipal, state and national; to the management of all public institutions, educational, charitable, and penal; to the conduct of all corporate enterprises affected with a public interest, transportation, banking, insurance; and to innumerable other subjects involving the public welfare. Will the liberty of the press be endangered if the discussion of such matters must be confined to statements of demonstrable truth, and to what a jury may ex post facto say is "fair" criticism and comment? Will free discussion of the subjects indicated be smothered if the newspapers understand that they must respond in damages for deducing and stating a wrong conclusion of fact from strong circumstantial evidence indicating fraud, corruption, or other conduct injurious to the public welfare? The case of *Atkinson v. Detroit Free Press*, 46 Mich. 341, 9 N. W. 501, was decided upon a question of pleading and a question of evidence. The opinion of the court did not treat the subject of privilege. Mr. Justice Cooley, however, took occasion to express himself upon the point now under consideration as follows:

"The beneficial ends to be subserved by public discussion would in large measure be defeated if dishonesty must be handled with delicacy and fraud spoken of with such circumspection and careful and deferential choice of words as to make it appear in the discussion a matter of indifference.

* * * If such a discussion of a matter of public interest were prima facie an unlawful act, and the author were obliged to justify every statement by evidence of its literal truth, the liberty of public discussion would be unworthy of being named as a privilege of value. It would be better to restore the censorship of a despotism than to assume to give a liberty which can only be accepted under a responsibility that is always threatening, and may at any time be ruinous. A caution in advance after despotic methods would be less objectionable than a caution in damages after in good faith the privilege had been exercised. No public discussion of important matters involving the conduct and motives of in-

dividuals could possibly be at the same time valuable and safe under the rules for which the plaintiff contends. It is a plausible suggestion that strict rules of responsibility are essential to the protection of reputation; but it is most deceptive, for every man of common discernment who observes what is taking place around him, and what influences control public opinion, cannot fail to know that reputation is best protected when the press is free. Impose shackles upon it, and the protection fails when the need is greatest. Who would venture to expose a swindler or a blackmailer, or to give in detail the facts of a bank failure or other corporate defalcation, if every word and sentence must be uttered with judicial calmness and impartiality as between the swindler and his victims, and every fact and every inference be justified by unquestionable legal evidence? The undoubted truth is that honesty reaps the chief advantages of free discussion; and fortunately it is honesty, also, that is least liable to suffer serious injury when the discussion incidentally affects it unjustly. * * * In what I say in this case I advance no new doctrines, but justify every statement of principle on approved authorities. It will be freely admitted that there are decided cases from which a different argument may be constructed, but it is affirmed that they are no longer deserving of credit if they ever were. The gradual and beneficial modification of the law of libel is shown in *Wason v. Walter*, L. R. 4 Q. B. 73, and, in so far as it has been modified, it has been made more consistent with just reason. While it is admitted that the public press is often corrupt and often reckless in dealing with private reputations, it is at the same time affirmed that the duty of its conductors to abstain from such misconduct is no plainer than is the obligation of the authorities to refuse to impose penalties when in the exercise of a just independence they make use of their columns for the exposure of public wrongdoers to public condemnation. The law, justly interpreted, is not chargeable with the inconsistency of tempting conductors of the press with a deceptive pretense of liberty, and then punishing them in damages if they act upon the assumption that the liberty is genuine." Pages 382-384.

If it be said that this argument contains an element of prophecy, it may be replied that it will support the liberal rule, as well as the same kind of prophecy in the *Hallam Case* supports the narrow rule. The *Hallam Case* quotes the following discrimination of the two rules made by Lord Chancellor Herschel in *Davis v. Shepstone*, 11 App. Cas. 187: "There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or

criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or approved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct." Page 190. This statement is one of elucidation merely, and furnishes no reason for a choice between the rules. It may be observed, however, that the decisions in England are in great conflict upon the question whether fair comment is a branch of the law of privilege. Only last year a writer in 23 *Law Quarterly Review*, p. 97, called attention to this fact, and expressed the hope that the case of *Thomas v. Bradbury, Agnew & Co., Limited*, L. R. 2 K. B. 627 (1906), might be taken to the House of Lords, so that the defense of fair comment might be reviewed, and placed upon some logical basis. It may be observed, further, that the distinction between comment and statements of fact cannot always be clear to the mind. Expression of opinion and judgment frequently have all the force of statements of fact and pass by insensible gradations into declarations of fact. In England fair comment includes the inference of motives if there be foundation for the inference. *Hunter v. Sharpe*, 4 F. & F. 983; *Campbell v. Spottiswoode*, 3 Best & Smith, 769. In the latter case Cockburn, C. J., said: "I think the fair position in which the law may be settled is this: That where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable." Page 775.

This doctrine is repudiated in *Hamilton v. Eno*, 81 N. Y. 116, and *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715, both cited in support of the Hallam decision. What is a charge of intoxication—an inference from conduct and appearances and therefore fair comment or the statement of a fact? What is the difference between a charge of intoxication and the following: "Having appearances which were certainly consistent with the belief that they had imbibed rather freely of the cup that inebriates. Their condition in the chapel also led one to such a conclusion?" *Davis v. Duncan*, L. R. 9 C. P. 396. In England this statement is fair comment. In New York, no matter how strongly appearances and conduct may justify the inference, a charge of in-

toxication made against a public officer must be fully proved. *King v. Root*, 4 Wend. 114, 21 Am. Dec. 102.

In keeping plain the distinction between comment and statements of fact, the courts of some of the states leave the law very much in the attitude of saying to the newspaper: "You have full liberty of free discussion, provided, however, you say nothing that counts." The *Hallam Case* quotes the Supreme Court of Ohio (*Publishing Co. v. Moloney*, 50 Ohio St. 71, 33 N. E. 921) in opposition to the liberal doctrine, as follows: "We do not think the doctrine either sound or wholesome. In our opinion a person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character, than he does his private property. Remedy by due course of law for injury to each is secured by the same constitutional guaranty, and the one is no less inviolate than the other. To hold otherwise would in our judgment drive reputable men from public positions, and fill their places with others having no regard for their reputation, and thus defeat the object of the rule contended for, and overturn the reason upon which it is sought to sustain it." Manifestly a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office, and the liberal rule requires no more. But, in measuring the extent of a candidate's profert of character, it should always be remembered that the people have good authority for believing that grapes do not grow on thorns, nor figs on thistles. The other arguments furnished by the Ohio quotation have already been considered. The *Hallam Case* contains nothing further worthy of note.

Another decision much approved, frequently quoted, and confidently proposed for consideration by the plaintiff here is that in the case of *Upton v. Hume*, 24 Or. 420, 33 Pac. 810, 21 L. R. A. 493, 41 Am. St. Rep. 863. The narrow rule is stated clearly and authorities for it are cited. The only reasons urged against the rival rule are the old ones—sensitive and honorable men would eschew politics, yellow journalism would run riot, candidates would be exposed to the malignity of party strife—and this new one: "The only safe evidence of a man's intentions are his acts, and, if he accuses another of a crime, he must conclusively be presumed to have intended to injure him." The doctrines of the common law relating to malice seem to the Delaware court, also, to be of the utmost importance in finding out what the true rule of privilege ought to be. *Star Publishing Co. v. Donahoe*, 58 Atl. (Del.) 513, 65 L. R. A. 980.

With all due deference to *Upton v. Hume*, the remarks

quoted read as if they had been written in the midst of the fog of fictions, inferences, and presumptions which enshroud the law of libel. Facts and the truth never have been much in favor in that branch of the law. Its early use as a weapon and shield of caste and arbitrary power would have been impaired. Suppose a serious charge to be made. By a fiction it is presumed to be false. By a fiction malice is inferred from the fiction of falsity. By a fiction damages are assumed as the consequence of the fictions of malice and falsity. Publication only is not presumed, and until recent times the offer to show the truth of the charge as having some bearing upon liability was a sacrilegious insult to this beautiful and symmetrical fabric of fiction. Then a defendant was made to suffer additional smart for venturing to obtrude the truth as a defense, if, although his proof were abundant, he barely failed in the opinion of the jury to make out a preponderance. It is however, in the field of malice, where the rule stated in the quotation lies, that truth and fact are most superfluous. In the first place, it is said that malice is the gist of the action for libel. This is pure fiction. It is not true. The plaintiff makes a complete case when he shows the publication of matter from which damage may be inferred. The actual fact may be that no malice exists or could be proved. Frequently libels are published with the best of motives, or perhaps mistakenly or inadvertently, but with an utter absence of malice. The plaintiff recovers just the same. Therefore "the gist of the action" must be taken out of the case. This is done by another fiction. It is said that, of course, malice does not mean the one thing known to fact or experience to which the term may apply, but it is just a legal expression to denote want of legal excuse.

In this state a statutory definition of libel making malice an essential ingredient as at the common law compels this court to say that the intentional publication of libelous matter implies "malice" whatever the motive in fact may be. *State v. Clyne*, 53 Kan. 8, 35 Pac. 789. So a fiction was invented to meet an unnecessary fiction which became troublesome, and the courts go on gravely ascending the hill for the purpose of descending, meanwhile filling the books with scholastic disquisitions, verbal subtleties, and refined distinctions about malice in law, malice in fact, express malice, implied malice, etc. Now what is the fact? Instead of malice being the gist of the action, it may come into a libel case and be of importance in two events only—to affect damages and to overcome a defense of privilege. If the occasion be absolutely privileged, there can be no recovery. If it be conditionally privileged, the plaintiff must prove malice, actual

evil-mindedness, or fail. When it comes to this proof, there is no presumption, absolute or otherwise, attaching to a charge of crime. The proof is made from an interpretation of the writing, its malignity, or intemperance by showing recklessness in making the charge, pernicious activity in circulating or repeating it, its falsity, the situation and relations of the parties, the facts and circumstances surrounding the publication, and by other evidence appropriate to a charge of bad motives as in other cases. Nothing else in *Upton v. Hume* requires comment, and no decisions more persuasive than those discussed have been cited or have fallen under the observation of the court.

Speaking generally, it may be said that the narrow rule leaves no greater freedom for the discussion of matters of the gravest public concern than it does for the discussion of the character of a private individual. It is a matter of common experience that whatever the instructions to juries may be they do not, and the people do not, hold a newspaper publisher guilty and brand him a calumniator if in an effort in good faith to discharge his moral duty to the public he oversteps that rule. In a political libel suit, if a nonpolitical jury be secured, the newspaper usually gets a verdict if, in, the language of *Balch's Case*, "the whole thing was done in good faith." Otherwise damages are assessed. Although he adhered to the narrow rule, Sir Frederick Pollock, when Chief Baron of the Exchequer, came near stating its rival when he said: "I think it quite right that all matters that are entirely of a public nature—conduct of ministers, conduct of judges, the proceedings of all persons who are responsible to the public at large—are deemed to be public property, and that all bona fide and honest remarks upon such persons and their conduct may be made with perfect freedom, and without being questioned too nicely for either truth or justice." *Gathercole v. Miall*, 15 M. & W. 318.

The liberal rule offers no protection to the unscrupulous defamer and traducer of private character. The fulminations in many of the decisions about a Telamonian shield of privilege from beneath which the scurrilous newspapers may hurl the javelins of false and malicious slander against private character with impunity are beside the question. Good faith and bad faith are as easily proved in a libel case as in other branches of the law, and it is an everyday issue in all of them. The history of all liberty, religious, political, and economic, teaches that undue restrictions merely excite and inflame, and that social progress is best facilitated, the social welfare is best preserved, and social justice is best promoted in presence of the least necessary restraint. Aside

from other reasons for adhering to it, the court is of the opinion that the rule in *Balch's Case* accords with the best practical results obtainable through the law of libel under existing conditions, that it holds the balance fair between public need and private right, and that it is well adapted to subserve all the high interests at stake—those of the individual, the press, and the public.

The plaintiff argues that the defense of privilege was destroyed by the fact that copies of the defendant's newspaper circulated in other states, complains of the instructions given upon the subject, and insists that the instruction offered by him should have been given. The instruction given was correct and follows the rule announced by this court in *Redgate v. Roush*, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236. There a matter of interest to communicants of a church was published in the church papers in Indiana, Ohio, Texas, and Nebraska. It was inevitable that they should be read by people of other denominations. The syllabus reads: "Where the publication appears to have been made in good faith and for the members of the denomination alone, the fact that it incidentally may have been brought to the attention of others than members of the church will not take away its privileged character."

This accords with the general rule stated in 25 Cyc. 387. See, also, *Hatch v. Lane*, 105 Mass. 394; *Mertens v. Bee Publishing Co.*, 5 Neb. (Unof.) 592, 99 N. W. 847. In the cases of *State of Iowa v. Haskins*, 109 Iowa, 656, 80 N. W. 1063, 47 L. R. A. 223, 77 Am. St. Rep. 560, *Buckstaff v. Hicks*, 94 Wis. 34, 68 N. W. 403, 59 Am. St. Rep. 853, and *Sheftall v. Central Railway Co.*, 123 Ga. 589, 51 S. E. 646, language is used from which it might be inferred that privilege will be destroyed if the communication should reach the eyes of others than persons interested. This would be the end of privilege for all newspapers having circulation and influence. Generally the publication must be no wider than will meet the requirements of the moral or social duty to publish. If it be designedly or unnecessarily or negligently excessive, privilege is lost. But, if a state newspaper published primarily for a state constituency have a small circulation elsewhere, it is not deprived of its privilege in the discussion of matters of state-wide concern because of that fact.

* * *

The judgment of the district court [which was for the defendant] is affirmed.¹⁹

¹⁹ Accord: *Marks v. Baker*, 28 Minn. 162, 9 N. W. 678. Also see a note in *Ann. Cas.* 1914C, 997-1006, citing cases from Iowa, Pennsylvania, South Dakota, and Texas in support of *Coleman v. Mac-*

F. RETRACTION

"* * * Let them consider that a short slander will oftentimes reach further than a long apology."—Milton, from *An Apology for Smectymmus*.

Points Involved.—**Note.**—Damages awarded in an action for libel may cover: (1) Actual pecuniary loss sustained, e. g., loss of employment; (2) actual damage to the reputa-

lennan, 78 Kan. 711, 98 Pac. 281, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390. Supporting this doctrine, on principle, see 15 Harv. Law Rev. 159, and 22 Harv. Law Rev. 445.

"* * * In this country every citizen has the right to call the attention of his fellow citizens to the maladministration of public affairs or the misconduct of public servants, if his real motive in so doing is to bring about a reform of abuses, or to defeat the re-election or reappointment of an incompetent officer. If information given in good faith to a private individual of the misconduct of his servant is 'privileged,' equally so must be a communication to the voters of a nation concerning the misconduct of those whom they are taxed to support, and whose continuance in any service virtually depends on the national voice. To be effectual, the communication must be such as to reach the public." *Palmer v. City of Concord*, 48 N. H. 211, 216, 97 Am. Dec. 605.

"Notwithstanding the deplorable consequences here predicted [referring to a quotation from *King v. Root*, 4 Wend. (N. Y.) 113, 21 Am. Dec. 102, denying defense of privilege] from too great license to the press, it is matter of daily observation that the press, in its comments upon events and public men, proceeds in all respects as though it were privileged; public opinion would not sanction prosecutions by candidates for office for publications amounting to technical libels, but which were nevertheless published without malice in fact; and the man who has a 'character to lose' presents himself for the suffrages of his fellow citizens in the full reliance that detraction by the public press will be corrected through the same instrumentality, and that unmerited abuse will react on the public opinion in his favor. Meantime the press is gradually becoming more just, liberal, and dignified in its dealings with political opponents, and vituperation is much less common, reckless, and bitter now than it was at the beginning of the century, when repression was more often resorted to as a remedy." Cooley, *Constitutional Limitations* (7th Ed.) pp. 644, 645.

The Corrupt and Illegal Practices Prevention Act, 1895 (58 and 59 Vict. c. 40).

"Section 1. Any person, who, or the directors of any body or association corporate which, before or during any parliamentary election, shall, for the purpose of affecting the return of any candidate at such election, make or publish any false statement of fact in relation to the personal character or conduct of such candidate shall be guilty of an illegal practice within the meaning of the provisions of the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), and shall be subject to all the penalties and consequences of committing an illegal practice in the said act mentioned. * * *

"Sec. 2. No person shall be deemed to be guilty of such illegal practice if he can show that he had reasonable grounds for believing, and did believe, the statement made by him to be true."

tion, somewhat hard to estimate, but none the less real, (3) damages for mental suffering; and (4) punitive damages, i. e., damages superadded by way of punishment to the defendant.

1. Does a published correction, retraction, and apology relieve the defendant of all liability, or only operate to reduce the measure of the award?

2. Note that in some states statutes have been passed bearing upon this question, and whether and to what extent they have been upheld.

1. Retraction Not a Complete Defense.—Retraction, correction, and apology never wipe out completely the plaintiff's cause of action. If, however, the retraction is full and fair it may always be offered in mitigation of damages.²⁰ How far it will go in reducing the amount that the plaintiff would otherwise recover is for the jury to decide. In referring to a published correction the Kentucky Court in the case of *Lehrer v. Elmore*²¹ said: "But this rectification did not relieve the defendant from liability for the libelous publication, and perhaps contributed little, if anything, towards repairing the wrong already inflicted."

A New York case holds that proof of retraction "goes only to show absence of actual malice, but it does not exonerate it [the defendant] from the consequences of original recklessness."²²

2. Retraction as a Preventive of Damages.—A retraction may operate to the defendant's advantage by preventing the original libel from continuing to cause damages. In other words, it may prevent some new harm from arising. For this reason, if for no other, retraction should be resorted to as soon as the error is discovered.

3. Statutory Provisions Concerning Retraction.—There are statutes in several states which provide in substance that, before an action is brought against a person for libel,

²⁰ *Coffman v. Spokane Chronicle Pub. Co.*, 65 Wash. 1, 117 Pac. 596, Ann. Cas. 1913B, 636.

²¹ 100 Ky. 56, 37 S. W. 292.

²² *De Severinus v. Press Pub. Co.*, 147 App. Div. 161, 132 N. Y. Supp. 80. In spite of proof of retraction, the court upheld in this case a verdict for the plaintiff for \$5,000.

his attention shall be called to the article and an opportunity be given to him to publish a correction or retraction; also that, if the original article was published in good faith and the retraction is full and fair, and inserted in as conspicuous a place and type as the original article, the plaintiff shall recover only "actual damages."

In a few of the states the statutes contain the additional provision that actual damages shall mean only "such damages as the plaintiff has suffered in respect to his property, business, trade, profession or occupation." Such a provision would preclude the plaintiff from recovering anything for physical pain and inconvenience, mental suffering and injury to reputation. These items though not so tangible or easily assessable as direct pecuniary loss, are, as has been pointed out, in some of the cases, none the less real.

Because of these limitations contained in the statutory definition of "actual damages," the Kansas and Michigan statutes have been held unconstitutional.²³

In the absence of this statutory definition of actual damages the North Carolina court decided that the only effect of the statute was to deprive the plaintiff of punitive or exemplary damages. On the basis of this interpretation the North Carolina statute was held constitutional, since for all real harm to himself the plaintiff would still be free to recover.²⁴

²³ *Hanson v. Krehbiel*, 68 Kan. 670, 75 Pac. 1041, 64 L. R. A. 790, 104 Am. St. Rep. 422; *Park v. Free Press*, 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544.

²⁴ See *Osburn v. Leach*, *infra*, p. 214.

There are also statutes dealing with the question of retraction in the following states: *Alabama*, Code 1907, §§ 3749, 3750, and 3751; *Indiana*, Burns' Ann. St. 1914, §§ 380, and 381; *Iowa*, Supplemental Supplement 1915, § 3592a (but damages not mitigated by retraction in case of imputation of unchastity to a woman, nor in case of the libel of a candidate for office, unless it is made in a conspicuous place on the editorial page and more than two weeks before election); *Kentucky*, Carroll's St. 1915, § 2438b; *Maine*, Rev. St. 1903, c. 84, § 43; *Massachusetts*, Rev. Laws 1902, c. 173, § 92; *Minnesota*, Gen. St. 1913, § 7901 (qualifications similar to those in Iowa, *supra*); *Texas*, Rev. St. 1911, art. 5596; *Utah*, Comp. Laws 1907, § 1348; *Virginia*, Pollard's Code 1904, § 3375; *Wisconsin*, St. 1913 § 4256a; *West Virginia*, Code 1913, § 4904.

Statutes in Nevada (Rev. St. 1912, § 6826) and in Ohio (Page & A. Gen. Code Supplement, §§ 6319—2 to 6319—6) make it a penal offense for a paper to refuse to publish a denial or correction tendered by

OSBORN v. LEACH et al.

(Supreme Court of North Carolina, 1904. 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648.)

CLARK, C. J.²⁵ This is an action for libel against M. T. Leach and the News & Observer Publishing Company. * * * The publication inspired by the defendant Leach charged that the plaintiff bought for the State's Prison, of which he was a director, certain mules, giving \$27 per head more than they were worth, and paying for horses double what they were worth, thus defrauding the State's Prison of that sum, and charged further that the plaintiff received for his services \$5 for each mule bought, as commissions, besides his expenses, and several hundred dollars for his time, when, as director, by law he was entitled to \$4 per day only (Laws 1899, p. 119, c. 24, §§ 4, 9, 10). This, if not a direct charge of fraud, is at least an allegation of a gross breach of official duty and misconduct by the plaintiff as director of a state institution, and incompetence, if not worse, in the purchase of the mules and horses, and the receipt of pay in excess of that allowed by law. This language was libelous per se (*Ramsey v. Cheek*, 109 N. C. 270, 13 S. E. 775), and the burden was upon the defendant to prove its truth or matter in mitigation. * * *

[The case raises] the question of the constitutionality of chapter 557, p. 784, Laws 1901, commonly known as the "London Libel Law." That statute has been adopted in several states in almost the identical words of our statute. It has been already presented in the Supreme Court of two of our sister states, and has been held to be unconstitutional in both, but because of the addition of words restricting "actual damages" to mean special damages, which words are omitted in our statute.

The Constitution of North Carolina provides: "All courts shall be open, and every person for an injury in his lands, goods, person, or reputation, shall have remedy by due course of law." Article 1, § 35. "The freedom of the press ought not to be restrained, but every individual shall be held responsible for the abuse of the same." Article 1, § 20. If, therefore, this chapter impairs the right of any one to recover for an injury to his reputation, or abridges the responsibility of the press for an abuse of the freedom of the press,

the defamed person or his representative—in the latter state, however, only if sworn to.

²⁵ Parts of the opinion of Clark, C. J., and the concurring opinion of Douglas, J., are omitted.

the Legislature is clearly forbidden by the above sections of the Constitution from the enactment of such statute.

Section 1, c. 557, p. 784, Laws 1901, is as follows: "Before any proceedings, either civil or criminal, shall be brought for the publication in a newspaper or periodical in this state of a libel, the plaintiff or prosecutor shall at least five days before instituting such proceedings serve notice in writing on defendant or defendants, specifying the article and the statements which he alleges to be false and defamatory. If it shall appear upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction were published in the same editions of corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if in a criminal proceeding, a verdict of guilty shall be rendered on such a state of facts, the defendant or defendants shall be fined a penny and costs and no more: provided this act shall not apply to existing suits." It must be noted that there is no penalty on the plaintiff, nor any exemption to the defendant, if the plaintiff does not choose to give the five days' notice, but there is merely a provision that five days' notice must be given by the plaintiff, in the manner stated, before issuing his summons, and that, when such notice is given, then, if within 10 days the specified retraction is made, and it appears that the article was printed in good faith by honest mistake, and with reasonable ground to believe the statements to be true, the plaintiff can only recover actual damages. It was therefore error in the court to nonsuit the plaintiff, because good faith, honest mistake, and reasonable ground of belief were affirmative defenses, which the court could not adjudge. But independently of that, as the argument raises the constitutionality of the act, it is well to dispose of it.

The plaintiff is entitled to recover actual damages under the act of 1901, and actual are compensatory damages, and include (1) pecuniary loss, direct or indirect, i. e., special damages; (2) damages for physical pain and inconvenience; (3) damages for mental suffering; and (4) damages for injury to reputation. Punitive damages are not included in what are termed actual or compensatory damages, and the act, upon the conditions therein specified, relieves and can relieve a defendant only against a claim for that particular kind of damages. They are awarded on grounds of public policy,

and not because the plaintiff has a right to the money, but it goes to him merely because it is assessed in his suit. 18 Am. & Eng. Law (2d Ed.) 1091; *Wallace v. Railway*, 104 N. C. 452, 10 S. E. 552. The right to have punitive damages assessed is therefore not property. The right to recover actual or compensatory damages is property. In our case the law presumes injury to the feelings, mental anguish, and injury to the reputation, the publication being libelous per se. The evidence of the plaintiff, besides, proves both these elements, and also physical suffering. There is no evidence of special damages, and it is not inferred. The plaintiff is entitled to recover compensation for mental and physical pain and injury to reputation. These are actual damages, and these are property. "The right to recover damages for an injury is a species of property, and vests in the injured party immediately on the commission of the wrong. It is not the subsequent verdict and judgment, but the commission of the wrong, that gives the right. The verdict and judgment simply define its extent. Being property, it is protected by the ordinary constitutional guaranties." *Hale on Damages*, p. 2, note 5; *Cooley, Const. Lim.* (5th Ed.) 445. It cannot be extinguished except by act of the parties or by operation of the statute of limitation. *Id.* This being an action upon a libel per se, the plaintiff has a right to recover compensatory damages. *Newell on S. & L.* 43; *Hale on Damages*, p. 99, note.

Compensatory damages include all other damages than punitive, thus embracing not only special damages, as direct pecuniary loss, but injury to feelings, mental anguish, and damages to character or reputation. 18 Am. & Eng. Enc. (2d Ed.) 1082 et seq.; *Hale on Damages*, pp. 99, 106. "Actual damages" are synonymous with "compensatory damages" and with "general damages." *Newell on S. & L.* 839; 18 Am. & Eng. Enc. (2d Ed.) 1081 et seq. Damages for mental suffering are actual or compensatory, not special nor punitive, and are given to indemnify the plaintiff for the injury suffered. 1 Am. & Eng. Enc. (2d Ed.) 602. The law infers actual or compensatory damages for injury to the feelings and reputation of the plaintiff from a libel calculated to humiliate him or injure his reputation or character. In similar statutes adopted in other states the following words were added, which are wisely omitted in our statute, i. e., that actual damages shall mean only "such damages as the plaintiff has suffered in respect to his property, business, trade, profession or occupation." And on account of the inclusion of those words, which restrict actual damages to mean special damages (i. e., actual pecuniary loss), the act has been held unconstitutional in most

conclusive opinions by very able courts, both in Kansas and Michigan.

In a recent opinion (*Hanson v. Krehbiel*, 75 Pac. 1041), filed March 12, 1904, the Supreme Court of Kansas, passing upon the constitutionality of chapter 249, p. 439, Laws 1901, of that state, which is verbatim our libel law (chapter 557, p. 784, Laws 1901), save the addition in that statute of the definition of actual damages, as above stated, holds that the statute is unconstitutional because in violation of section 18 of the Kansas Bill of Rights, which gives to all persons injured in person, reputation, or property remedy 'by due course of law; such constitutional guaranty being almost identical with the above-cited section 35, art. 1, of the Constitution of North Carolina. The Supreme Court of Kansas says: "It will be noted that the questioned statute limits the right of recovery in cases of libel to actual damages, where, after service of notice provided in the first section, the publisher of the newspaper in which the libelous matter has appeared shall make a full and fair retraction of the libelous matter, coupled with a showing upon the trial that the same was published in good faith, under a misapprehension of the facts, and defines that class of damages to be such as the plaintiff has suffered in respect to his property, business, trade, profession, or occupation. So that in such cases the libeled party may not recover all his damage, but he is confined to the narrow class designated and defined in the act as actual damages. The common law recognizes two classes of damages in libel cases—general and special. General damages are those which the law presumes must naturally, proximately, and necessarily result from the publication of the libelous matter. They arise by inference of law, and are not required to be proved by evidence. They are allowable whenever the immediate tendency of the words is to impair the plaintiff's reputation, although no actual pecuniary loss had in fact resulted, and are designed to compensate for that large and substantial class of injuries arising from injured feelings, mental suffering and anguish, and personal and public humiliation, consequent upon the malicious publication of the false and libelous matter. The injury for which this class of damages is allowed is something more than merely speculative. While not susceptible of being accurately measured in dollars and cents, it is a real one, and more often than otherwise more substantial and real than those designated as actual, and measured accurately by the dollar standard. In short, it is such an injury to the reputation as was contemplated in the Bill of Rights. The law presumes that this class of injuries resulted necessarily from the publi-

cation of the libelous matter, and the damages therefore were recoverable without special assignment.

"Special damages were also recoverable, when properly pleaded and shown, and were such damages as were computable in money, and may be said to be fairly embraced in the list of actual damages as given in the statute referred to. This was the condition of the law at the time of the adoption of our Constitution, and is now, and all these are the injuries to reputation for which it provided that there should be 'remedy by due course of law.' It requires no argument to demonstrate that the act in question does deny remedy for a portion of these injuries. Unless the one libeled has suffered in the particular manner pointed out in the statute, he is remediless. For that other large class of persons, and still larger class of injuries, no remedy is found. From the writings of the world's wisest man we have the assurance 'that a good name is rather to be chosen than great riches.' Yet the possessor of this thing of greatest value, being despoiled of it, is left entirely without remedy for its loss, by the statute in question, except in such rare cases as he shall be able to show some exact financial injury in the particulars named. We could not excuse ourselves for holding that reputation is less valuable than property, or that it is less protected from spoliation by the quoted provision of the Bill of Rights. * * * " It further says: "The retraction required by the act in question may or may not be full reparation for the injury suffered. It might the rather aggravate the injury already inflicted, than mollify it. It is sufficient to say, however, that all these are questions for the courts, upon proper notice to all parties, and may not be determined arbitrarily by an act of the Legislature. * * * " We have thus copied at some length the discussion of an almost identical statute by the very able Supreme Court of our sister state because of the clearness and vigor with which it presents our own views upon the subject.

The Supreme Court of Michigan also holds a similar statute unconstitutional (*Park v. Detroit Free Press*, 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 540), saying: "We do not think the statute controls the action or is within the power of constitutional legislation. This will, in our judgment, appear from a statement of its effect if carried out. It purports to confine recovery in such cases against newspapers to what it calls 'actual damages,' and then defines actual damages to cover only direct pecuniary loss in certain specified ways, and none other. In some of these defined cases the proof of any damages in this sense would be impracticable, and in all it would be very difficult. They are confined to damages in respect to property, business, trade, pro-

fession, or occupation. It is safe to say that such losses cannot be the true damage in a very large share of the worst cases of libel. A woman who is slandered in her chastity is, under this law, usually without any redress whatever. A man whose income is from fixed investment or salary or official emolument, or business not depending upon his repute, could lose no money directly unless removed from the title to receive his income by reason of the libel, which could seldom happen. If contradicted soon, there could be practically no risk of this. And the same is true concerning most business losses. The cases must be very rare in which a libel will destroy business profits in such a way that the loss can be directly traced to the mischief. There could never be any loss when employers or customers know or believe the charge is unfounded. The statute does not reach cases where a libel has operated to cut off chances of office or emolument in the future, or broken up or prevented relationships not capable of an exact money standard, or produced that intangible but fatal influence which suspicion, helped by ill will, spreads beyond recall or reach by apology or retraction. Exploded lies are continually reproduced without the antidote, and no one can measure with any accurate standard the precise amount of evil done or probable. There is no room for holding, in a constitutional system, that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief." This case has subsequently been approved by the same court in *McGee v. Baumgartner*, 121 Mich. 287, 80 N. W. 21, where the court holds that "the right to recover in an action of libel for damages to reputation cannot be abridged by statute."

These decisions were by unanimous courts. A contrary view was expressed, but by a divided court, in *Allen v. Pioneer Press*, 40 Minn. 117, 41 N. W. 936, 3 L. R. A. 532, 12 Am. St. Rep. 707, based mainly upon the reasoning that the retraction, being required, as it is, to be published as widely and to substantially the same readers, is usually a more complete redress than would be a judgment for damages. But as the Kansas Supreme Court, *ut supra*, well observes, this may or may not be true, and, even if true, it is not "remedy by due course of law," which section 35, art. 1, guarantees that every person shall have, through the courts, "for an injury to his lands, goods, person or reputation." He is entitled by constitutional right, to have such injury determined, and the amount of just compensation for his wrong settled by

a jury of his peers. He cannot be deprived of this by a legislative adjudication beforehand that a retraction by the newspaper is full compensation for the injury he has suffered. And even in that case (*Allen v. Pioneer Press*) a new trial was granted because the question of good faith should have been submitted to the jury.

It was therefore error in the court below to sustain the third ground of the motion, which construed the statute as restricting the recovery to special damages. Those words are not in our statute, and, if they were, the statute would be unconstitutional, as we have seen. Besides, as above stated, whether the publication was made in good faith, honest mistake, and with reasonable ground of belief—the conditions which, taken with the retraction, would relieve from punitive damages—is an affirmative defense, to be found by the jury upon the evidence. It was error for the court to find it.

The provision for retraction, construed according to its palpable meaning, as affording opportunity to escape punitive damages only, and when there was good faith, honest mistake, and reasonable ground of belief before publication, is an appropriate remedy, in its terms, for newspapers and periodicals, and could not well apply to others. It applies equally to all newspapers and periodicals, and we do not think it a discrimination forbidden by the Constitution.

The only remaining question is whether the court was justified in dismissing the action upon the first ground in the motion of the defendant *The News & Observer Publishing Company* for failure to give the five-days notice required before bringing an action of this nature. Such failure was held to be ground for demurrer in *Williams v. Smith*, 134 N. C. 249, 46 S. E. 502. The giving of such notice is required only for the purpose of furnishing the defendant opportunity to publish a retraction, the effect of which, as we have seen, could extend no further than to relieve from punitive damages, even when good faith, honest mistake, and reasonable ground of belief are shown by the defendant. When such demurrer is sustained, the action should not be dismissed, but the court can still permit, in its discretion, the plaintiff to amend the complaint by averring such notice, if it was in fact given; and, if it was not, the action is still valid for the recovery of actual damages—i. e., of all except punitive damages—and it would be error to dismiss it. In this case, failure to give the five-days notice in no wise could affect the defendant, for the additional reason that it actually did make the retraction, to afford the opportunity of doing which is the only reason for requiring the notice.

For the reasons given there must be, as to both defendants, a new trial.

DOUGLAS, J., concurs in the result.

WALKER, J., concurs in result only.

CONNOR, J., did not sit on hearing of this case.²⁶

SECTION 4.—DAMAGES

1. **Classification.**—Damages are classified generally as punitive, compensatory, and nominal. Compensatory damages in turn are classified as general and special.

2. **Punitive Damages.**—Punitive damages are assessed primarily with a view to punishment. They are sometimes referred to as "smart money." They are also termed in the alternative exemplary damages. As such they are not given to compensate the plaintiff for any loss or injury either general or special, although the circumstances which justify their award may also cause added mental suffering to the plaintiff and hence be considered also in assessing the actual damage. Such damages are not proper unless the defendant has been actuated by bad motives or has been grossly careless in the conduct of the paper.

3. **Compensatory Damages.**—Compensatory damages include all damages other than punitive. They embrace not only special damages such as direct and tangible pecuniary loss, for example loss of a position, but such general damage as arises from injury to feelings, mental anguish, and harm done to the reputation. All of the elements are taken into consideration in the attempt to indemnify the plaintiff for actual injury.

"General damages," said the Kansas Supreme Court,²⁷

²⁶ Even in the absence of statute, a retraction may be shown in counteraction of punitive damages. See *Coffman v. Spokane Chronicle Publishing Co.*, 65 Wash. 1, 117 Pac. 596, Ann. Cas. 1913B, 636 (1911): "When a newspaper has libeled a person, the duty is imposed upon it to make a full and complete retraction. If it does so, it may plead and show such retraction in mitigation of damages." But a mere offer to retract cannot be proved, *Turton v. New York Recorder Co.*, 144 N. Y. 144, 38 N. E. 1009.

²⁷ *Hanson v. Krehbiel*, 68 Kan. 670, 75 Pac. 1041, 64 L. R. A. 790, 104 Am. St. Rep. 422.

"are those which the law presumes must naturally, proximately and necessarily result from the publication of the libelous matter. They arise by inference of law and are not required to be proved by evidence. They are allowable whenever the immediate tendency of the words is to impair the plaintiff's reputation, although no actual pecuniary loss had in fact resulted, and are designed to compensate for that large and substantial class of injuries arising from injured feelings, mental suffering and anguish, and personal and public humiliation, consequent upon the malicious publication of the false and libelous matter. The injury for which this class of damages is allowed is something more than merely speculative. While not susceptible of being accurately measured in dollars and cents, it is a real one, and more often than otherwise more substantial and real than those designated as actual, and measured accurately by the dollar standard."

Damages covering these items of injury have run as high as \$50,000.²⁸

An example of special damages would be loss of a specific position or definitely specified business.

4. Nominal Damages.—Sometimes the damages assessed by the jury are merely nominal. If so, they are awarded for the single purpose of vindicating the plaintiff's character. At times such vindication is really all that the plaintiff is seeking. Such was the case when the late ex-president Roosevelt sued the Detroit News for charging him with drunkenness. He was doubtless fully satisfied with the award of six cents damages.

²⁸ See *Cook v. Globe Printing Co. of St. Louis*, 227 Mo. 471, 127 S. W. 332, in which the jury returned a verdict of \$50,000 actual damages and \$50,000 punitive damages. The court ordered a remittitur of \$25,000 from each of these items, on pain of reversal on the ground that the awards were excessive. On pages 372 to 376 of 127 S. W., a list of all the Missouri defamation cases, with the amount of the damages assessed in each, is given.

SCRIPPS v. REILLY.

(Supreme Court of Michigan, 1878. 38 Mich. 10.)

Libel. Reilly sued Scripps, who was the principal proprietor of a newspaper called the Evening News, for publishing therein a scurrilous article purporting to give the substance of a bill of complaint filed against a third party and seriously implicating Reilly. He recovered a verdict of \$4,500 damages, but judgment was reversed by the Supreme Court (*Scripps v. Reilly*, 35 Mich. 371, 24 Am. Rep. 575) and a new trial ordered. Upon the second trial, which is reviewed in this opinion, Reilly recovered a verdict for \$5,000 and Scripps again brought error.

MARSTON, J.²⁹ * * * The question of damages has been so frequently and fully discussed in this state that it does not seem necessary to refer to the decisions in other states, at least so far as the present case is concerned, which involves only the question of the allowance of exemplary damages.

I think the following rules may be laid down as the result of the decisions in this state upon this subject:

1. In any injury entitling the party to redress, damages to the person, property and reputation, together with such special damage as may be shown are recoverable.

2. Where the act done is one which from its very nature must be expected to result in mischief, or where there is malice, or willful or wanton misconduct, carelessness or negligence so great as to indicate a reckless disregard of the rights or safety of others, a new element of damages is allowed, viz. for injury to the feelings of the plaintiff.

3. Damages for injuries to feelings are only allowed in those torts which consist of some voluntary act or very gross neglect, and depend in amount very much upon the degree of fault evinced by all the circumstances.

4. Where the tort consists of some voluntary act, but no element of malice, carelessness or gross negligence is shown to have existed, but that the wrong was done in spite of proper precaution, the damages to be awarded on account of injured feelings, will be reduced to such sum as must inevitably have resulted from the wrong itself.

5. Where, however, the elements exist in a case, entitling a party to recover damages for injured feelings, the amount to be allowed for shame, mental anxiety, insulted honor, and suffering and indignation consequent on the wrong, may be

²⁹ Parts of the opinion are omitted.

increased or aggravated by the vindictive feelings, or the degree of malice, recklessness, gross carelessness or negligence of the defendant, as the injury is much more serious where these elements, or either of them, are shown to have existed.

6. This increase of damages dependent upon the conduct of the defendant must be considered in this state as actual damages, although usually spoken of as exemplary, vindictive or punitive, and the amount thereof to be recovered, where recoverable at all, as they are incapable of ascertainment by any other known rule, must rest in the fair and deliberate judgment and discretion of the jury acting upon their own sense of justice in view of all the circumstances, both mitigating and aggravating, appearing in the case, and which can fairly be said to give color to or characterize the act, aided, however, by such instructions from the court as will tend to prevent the allowance of damages merely fanciful, or so remote as not fairly resulting from the injury.

7. So far as these damages are concerned, the fact that an indictment may or may not be pending or threatened for the same wrong is wholly immaterial, as they are allowed by way of remuneration for the injury sustained. If their allowance also operates by way of punishment, this is an indirect result equally applicable to damages allowed for injuries to person or property.

8. In cases of libel the publication is always considered a voluntary act, and is presumed to have proceeded from malicious motives. The actual motive may, however, be shown, either in aggravation or reduction of the damages to the feelings of the person injured. In other words, the spirit and intention of the defendant in publishing the libel may be considered by the jury in estimating the injuries done to the plaintiff's feelings.

9. Want of proper precaution in the employment of agents or assistants, or of proper care in the conduct of the paper, or the retention of improper employees after ascertaining their incompetency, carelessness or negligence, may be shown to increase the damages to wounded feelings; but express malice in the employees would not be admissible for such purpose where the act was done without the knowledge or consent of the defendant, where proper care had been exercised in their employment and retention. *Detroit Daily Post Company v. McArthur*, 16 Mich. 447; *Welch v. Ware*, 32 Mich. 77, and authorities cited on page 86; *Elliott v. Van Buren*, 33 Mich. 56, 20 Am. Rep. 668; *Livingston v. Burroughs*, 33 Mich. 511; *Friend v. Dunks*, 37 Mich. 25. * * *

Complaint is made of the refusal of the court to instruct the jury that they might take certain facts into consideration,

among others, the hurry incident to the issuing of a newspaper, and the time in connection therewith at which the article in question was received.

It is very difficult to say, as matter of law, just what weight should be given by the jury to such facts and circumstances. That they are admissible and should be considered by the jury, not as an excuse or justification, but as circumstances characterizing the act we have no doubt. An article may be brought in just as the paper is going to press, and inserted. If libelous, the proprietor would be liable, yet the time the information or article was received and the opportunities afforded for examining the truth or falsity of the statements therein contained before the paper would go to press should be considered in fixing the amount of damages to be recovered. We can but determine and announce what is the general rule upon this subject, and not one that might be applicable to this newspaper and no other. We must recognize some well-known facts applicable perhaps to the publication of every important daily newspaper; that there will at times be more haste exercised, in the preparation of articles, in order that they may appear in the edition then going to press, will be disputed by none. There is a laudable desire on the part of publishers to give their readers the very latest and most reliable news, and for this purpose the press will be stopped that an important item just received may be inserted. It necessarily follows that on such occasions the same careful scrutiny cannot be exercised that would at others, and thus the most watchful be deceived.

If a sufficient force of competent persons have been employed to gather the news, prepare and supervise the articles before publication, even although a large number of items may appear in each edition, the danger of errors creeping in at any time will be very much lessened. If an adequate force has not been employed, or if due care has not been exercised in their employment or retention, the danger will be much greater; but these facts should all be taken into consideration in ascertaining and determining whether due and proper care has or has not been exercised.

The question of negligence must depend upon the circumstances peculiar to each particular case. It consists largely in a want of proper care, taking into consideration all the surrounding circumstances, and applying thereto general rules applicable to that class of business as ordinarily carried on, and what might under the circumstances in a given case, tend to show negligence, under other and different circumstances might have no such tendency.

If a person were about to publish an article he knew would

be libelous, undue haste on his part to throw it before the public might well be considered as an aggravation of the offense, while, if he were acting in good faith, with pure motives and with an earnest desire to give the public what he considered an important item of news, haste in so doing would be praiseworthy; and should such an article afterwards appear to be untrue and libelous, his motive in publishing it, and the time he had for investigation or deliberation might well be considered in mitigation of such damages as gross negligence might be shown to increase.

In what has been here said we think there is nothing that can in any way be construed as even tending to give encouragement to undue haste or want of care in the preparation and supervision of articles intended for the press. The size and importance of the paper, the large number of items inserted therein, and the dispatch consequent thereon, call for a larger force and greater watchfulness than would be deemed necessary in an obscure or insignificant publication, containing but few items and with a limited circulation. Nor do we think that the general rules we have endeavored to lay down, applicable to newspapers of character and credit, can be used to encourage or protect the publication of another class, pernicious in the character and tendency of the articles frequently inserted therein, whose publishers hesitate not to attack private character, and with which neither social decency nor honor is held in the least regard, who delight in pandering to a vitiated and depraved taste, by the publication of indecent matter unfitted for the public eye. The law endeavors to protect private character from detraction and abuse, and when private character is dragged before the public for such a purpose, not as a subject in the discussion of which the public may reasonably be supposed to have an interest, but to pander to a depraved appetite for scandal, such publications soon give character to the paper. The publication of such articles, whether the facts stated therein are true or not, are improper and unjustifiable, and show recklessness and a want of due care on the part of the publishers of the paper.

Such articles are usually published from impure and sordid motives, and when permitted or countenanced by those in authority the employees are thereby encouraged and sanctioned in continuing such a reprehensible course. An employee engaged by the publishers of a reputable journal would with diffidence publish scandalous matter therein, and, if reprimanded for so doing, would not be likely to repeat the offense, while one employed in seeking for and publishing news in one of less character, when once sanctioned by his employer in the

publication of such matter, would thereafter be much more likely to seek for and publish all such with avidity. Under such dissimilar circumstances it would be folly to expect in each case thereafter the same care and prudence in the selection of articles for publication.

When, therefore, in a case like the present, it becomes important to consider what degree of care and prudence has been exercised by the proprietor of a newspaper in the publication thereof, we can see no good reason why the character which the paper has earned may not be shown, irrespective of the truth or falsity of the articles, by the introduction of the paper containing them to aid the jury in determining the question.

And while, even where the very best of care is exercised, libelous matter may sometimes creep into newspapers of character, and for which the publishers will be liable to respond in damages, yet they will be protected from such damages as a jury would be sure to inflict upon those who are reckless and indifferent as to the rights and feelings of others, who hesitate not to publish scandalous matter, the publication of which can accomplish no good or useful public purpose. There doubtless may be a publication of many things harmless in themselves, which in no way interest the public, and of which no one would complain. We have not intended to say anything against the publication of such articles. * * *³⁰

SECTION 5.—RESPONSIBILITY OF OWNER, EDITOR IN CHIEF, AND MANAGING EDITOR

Points Involved.—1. A. is the owner of a newspaper, but spends his time abroad, and intrusts the publication of the paper to his employees. Is A. responsible (a) civilly, or (b) criminally, for libels published in the paper?

³⁰ For certain errors committed in the trial court, the case was reversed and a new trial ordered.

For a further discussion of the subject of damages, see *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648, *supra*, p. 214.

Statute.—Pub. St. N. H. 1901, c. 223, § 6: "In actions for libel or slander, under the general issue, the defendant may prove, in mitigation of damages and to rebut evidence of actual malice, that the writing or words complained of were the repetition of common report, and that the conduct of the plaintiff was such as to create suspicion of the truth of the matters therein charged against him."

Without the aid of statute it is generally held that the defendant may in mitigation of damages prove that the plaintiff's reputation

2. May the defamed person, in the alternative, sue the editor in chief or the managing editor for the libel?

3. If the owner of the paper is a corporation, are the stockholders or officers of the corporation responsible for a libel appearing in the paper?

1. Civil Liability of the Owner.—The rules of agency make the publisher responsible for the acts of his employees, and hence for everything that is published in his paper. Personal knowledge of what is inserted is not an essential element of his liability. Even a direction to his employees not to publish libelous matter will not protect him.

2. Civil Liability of the Managing Editor.—The general managing editor is placed by some authorities, but not by all, in the same class with the owner. He is, of course, responsible for his own acts, and for those acts of others which he specially directs; but there is a question as to whether he should be held generally for the acts of sub-employees, where he is in fact ignorant of what they have inserted in the paper. In *Smith v. Utley*³¹ it was held that the managing editor was liable in tort for the publication of a libel, notwithstanding his ignorance of the fact that it was being inserted. The court said his legal responsibility was identical with that of the owner. In *Folwell v. Miller*,³² however, the court ruled that the managing editor was not liable for a libel published during his absence and without his knowledge; but it was conceded that, if he had been on active duty while the issue in question was being put out, he might have been held in spite of his ignorance of the particular insertion.

The authorities apparently do not distinguish between the liability of the editor in chief and the managing editor.

For the very practical reason that the owner is financially responsible, whereas the editor or managing editor may not be, and for the further reason that his legal liability is easier to establish, the aggrieved party usually sues the owner.

was badly besmirched prior to the publication of the libel complained of. This is allowed on the theory that a character that is already black is not made noticeably blacker by an additional spot.

³¹ *Infra*, p. 234.

³² *Infra*, p. 236.

The cases discussing the law as to the editor and managing editor are therefore few in number.

3. **Criminal Liability of the Owner, Managing Editor, and Others.**—Unless there is a statute making the rule of liability more drastic, one is not criminally liable unless he is guilty of connivance or carelessness in supervising what is published. The distinction between tort liability and criminal liability is due to the fact that the criminal law seeks to find personal blameworthiness.

Actual proof of approval or connivance on the part of the publisher or editor, however, is not required. It may be inferred from the general character of the paper.³³

In a few states the subject of liability, more particularly criminal liability, is covered by statute.

In Minnesota a statute provides: "Every editor or proprietor of a book, newspaper, or serial, and every manager of a copartnership or corporation by which any book, newspaper, or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper, or serial. But in every prosecution for libel the defendant may show in his defense that the matter complained of was published without his knowledge or fault, and against his wishes, by another who had no authority from him to make such publication, and whose act was disavowed by him as soon as known."³⁴

In Maine the statute³⁵ reads as follows: "Whoever manages or controls the business of a printing office, bookstore or shop, as principal or agent, or is, in whole or in part, proprietor, editor, printer, or publisher of a newspaper, pamphlet, book or other publication, is responsible [criminally] for any libel printed or published therein, unless he proves on trial that it was printed and published

³³ *State v. Mason*, 26 Or. 273, 38 Pac. 130, 26 L. R. A. 779, 46 Am. St. Rep. 629.

³⁴ See, also, to the same effect: *Nevada*, Rev. Laws 1912, § 6430; *New York*, Penal Law (Consol. Laws, c. 40), § 1344; *North Dakota*, Comp. Laws 1913, §§ 9551 and 9555; *Utah*, Comp. Laws 1907, § 4201; *Wisconsin*, St. 1913, § 4522c; *Washington*, Rem. & Bal. Codes 1910, § 2427 (differing, in that the last sentence reads "and was retracted by him [editor] as soon as known with an equal degree of publicity").

³⁵ Rev. St. 1903, c. 130, § 3.

without his knowledge, consent or suspicion, and that by reasonable care and diligence he could not have prevented it."

A further variation of the statutory rule is found in Texas:³⁶ "If the libel be in printed form and issues or is sold in any office or shop where a public newspaper is conducted, or where books or other printed works are sold or printed, the editor, publisher or proprietor of such newspaper or anyone of them or the owner of such shop is to be deemed guilty of circulating or making such libel till the contrary is made on the trial to appear." But it is further provided in article 11611 that the editor may avoid liability by giving the name of the author, provided such author is a resident of the state and a person of good character, except in cases where it is shown that such "editor, proprietor, or publisher, caused the libel to be published with malicious design."

In a few states it is provided without qualification as follows: "Each author, editor, and proprietor of any book, newspaper, or serial publication, is chargeable with the publication of any words contained in any part of such book, or number of such newspaper or serial."³⁷

Florida departs from the more common statutory provisions: "Any owner, manager, publisher or editor of any newspaper or other publication who permits any anonymous communication, or communications, such as is signed otherwise than with the true name of the writer and such name published therewith, to appear in the columns of his publication, in which said communication any person is attacked in his good name, or it is attempted to bring disgrace or ridicule upon any person, such owner, manager, publisher or editor shall be punished by a fine not to exceed five hundred dollars or imprisonment not to exceed one year."³⁸

³⁶ Vernon's Ann. Pen. Code 1916, art. 1160.

³⁷ *California*, Pen. Code, § 253. To the same effect, see *Arizona*, Rev. St. 1913, § 226; *Idaho*, Rev. Codes, § 6742; *Montana*, Rev. Codes, 1907, § 8330; *New Jersey*, 2 Comp. St. 1709-1910, p. 1815; *South Dakota*, Comp. Laws 1913, § 320.

³⁸ Comp. Laws, Fla. 1914, § 3258. See, also, Pen. Code Cal. § 259.

4. Liability of Stockholders and Officers of a Corporation.—If the paper is owned by a corporation, the stockholders and officers are not as such personally liable. Their personal liability, if any, must rest upon their personal participation in the conduct of the business.

The rule has been accurately phrased by the Supreme Court of Wisconsin as follows: "All persons engaged in publishing and circulating a libel are responsible therefor, and may be proceeded against either jointly or severally. Officers, stockholders, or members of a publishing corporation are not liable for a libelous publication simply because of official position or membership, unless they come within one of the exceptions hereinafter named. Their liability, if any, springs from their active agency in producing and circulating the libel. But if it be shown that they in any way aided, assisted, or advised its publication or circulation, or that their duties as officers or agents of the concern were of such a character as to charge them with the performance of functions concerning the publication and circulation of the paper, such duties being of such nature that the law implies that such officers or agents knew or ought to have known of the publication, they are liable, and cannot defend on the ground merely that they did not know about the libel until after it was published."³⁹

5. Liability of the Writer.—It goes without saying that the reporter, or other writer, who composes the libelous article is responsible both civilly and criminally. He cannot hide behind the publisher.

CRANE v. BENNETT.

(Court of Appeals of New York, 1904. 177 N. Y. 106, 69 N. E. 274, 101 Am. St. Rep. 722.)

MARTIN, J.⁴⁰ This action was for libel. It was based upon four articles published in the New York Herald, a newspaper owned by the defendant, who resides in France, but whose paper is published in the city of New York. Its management was confided solely to persons in his employ, who had

³⁹ Pfister v. Sentinel Co. et al., 108 Wis. 572, 580, 84 N. W. 887.

⁴⁰ Part of the opinion is omitted.

practical control of the entire business. The plaintiff was a magistrate in the city of New York. The matter complained of was published in four issues of the defendant's newspaper, and related to alleged flagrant misconduct imputed to the plaintiff in the discharge of his official duties. The articles were published, respectively, on the 21st, 22d, 23d, and 24th days of August, 1899. The first and each succeeding article related to the same subject, and they were all libelous *per se*. After the publication of the first and of each succeeding one, the plaintiff wrote to the defendant's manager, stating that each of the articles was untrue and unjust, and asked that the defendant retract or apologize therefor. Instead of sending or publishing a retraction or apology, another article to the same general effect, and relating to the same subject, was published, including an editorial. After these repeated requests of the defendant's manager, and after writing to the defendant personally upon the subject, stating that the publication of such articles was creating a feeling of distrust, and tending to disgrace him in the eyes of the community, the plaintiff waited until the 13th of the following November, when this action was brought to recover the damages sustained by reason of such publications. That each of the articles published was proved to be false and was libelous *per se* is not denied, nor is it disputed that their publication was continued from day to day, and no retraction made by the defendant or those managing and conducting the publication of his newspaper and the business connected therewith. Obviously there was abundant evidence to justify the jury in finding that the publication of the libels complained of was recklessly and wantonly made and continued, with utter disregard of the rights or feelings of the plaintiff. This brief but general review of the situation is all the statement as to the facts we deem necessary to dispose of the questions of law which are presented upon this appeal.

The defendant contends that, as the acts complained of were performed in his absence by his manager and employés, he is not liable for punitive or exemplary damages, inasmuch as there was no proof of personal ill will or hatred upon his part sufficient to form a basis for the finding of actual malice. That the proprietor of a newspaper is responsible for all that appears in its columns, although the publication may have been made in his absence and without his knowledge, is too well settled to require discussion. His liability is not upon the ground of his being the publisher, but because he is responsible for the acts of the actual publisher. Townshend on Slander & Libel, § 123; Newell on Defamation, Slander & Libel, p. 377; Odgers on Libel & Slander, p. 412; Huff v.

Bennett, 4 Sandf. 120; *Andres v. Wells*, 7 Johns. 260, 5 Am. Dec. 267. In libel cases, the falsity of the libel being proof of malice sufficient to uphold exemplary damages (a question we shall presently discuss), the right to recover them, in the discretion of the jury, rests in the very act done in the publication of the false libel; and whoever is chargeable with that act is chargeable with the legal consequence, which is the right of the jury to redress the wrong by imposing reasonable damages beyond any injury actually shown. Dissenting opinion of Davis, P. J., in *Samuels v. Evening Mail Ass'n*, 9 Hun, 288, 294, affirmed in 75 N. Y. 604.

Although a mere servant or agent employed to perform some specific act for a principal may not render the latter absolutely liable for increased damages on account of his motives in performing it, yet, when a principal surrenders to his general manager and employes all his business affairs, or the general management of some particular business, absents himself from the jurisdiction where his paper is edited and published, leaving such manager in entire charge thereof, he is responsible for the manner in which his business is conducted. In other words, a principal surrendering his entire business to another, to be conducted for him, should be held to the same responsibility he would incur if he himself personally directed it, as to all matters coming within the line of the authority which he has conferred upon such manager or employes. Therefore, while, as was held by the trial court, the defendant might not have been liable for any personal ill will of his employes or servants against the plaintiff, if there was a willful departure from such business for their private or individual purposes, yet he is responsible for the manner in which the business so delegated was performed by his manager; and if the publication complained of was wanton, reckless, or heedless of the rights or feelings of the plaintiff, and, upon being apprised of the groundlessness of the charges, there was a continued refusal to make or publish any retraction thereof, the defendant was fully responsible for the acts of his general manager, and liable for such punitive damages as the jury, in its discretion, might award.⁴¹ * * *

Judgment [for the plaintiff] affirmed.

⁴¹ Accord: *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530 (1911); *Perret v. New Orleans Times Newspaper Co.*, 25 La. Ann. 170.

SMITH v. UTLEY.

(Supreme Court of Wisconsin, 1896. 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620.)

This is an action to recover damages for the publication of several articles, alleged to be libelous, in the Racine Evening Times, a newspaper owned by the Times Publishing Company, a corporation. The plaintiff was the chief of police of Racine. The article declared the members of the police force to be "hogs," and "blood-sucking police officers who insist on sitting on juries," adding that "this had no reference to Georgie, the chief of police, who is beneath our notice."

MARSHALL, J.⁴² * * * The second question presented is, does the evidence sufficiently connect the defendant Utley with the publication to render him liable in damages, or to make it the duty of the court to submit the question to the jury? The owner of the paper was a corporation. Defendant Utley was its president and active manager. He was the principal editor. To be sure, he testified that he did not authorize or know of the publication. He said: "I do most of the editorial work. I do everything. I am the political editor; the principal editor. I believe my name appears on the paper as editor." There is other evidence tending to show that, in addition to being the chief executive officer of the corporation, he was the managing editor of the paper, and actively engaged in his duties at the time the libelous article was published. If such are the facts, he does not stand in the position of a person who is sought to be charged merely because of being a stockholder or officer of the corporation, or come within the cases where it is held that mere proof of ownership of stock or official position is not sufficient to show active agency in the production and publication of the libel, so as to render such owner or officer individually responsible, as in *Mecabe v. Jones*, 10 Daly, 222; *Belo v. Fuller*, 84 Tex. 450, 9 S. W. 616; *Simonsen v. Herold*, 61 Wis. 626, 21 N. W. 799; but comes within the exception mentioned in *Belo v. Fuller*, *supra*, as follows: "That persons are stockholders and officers of the publishing corporation will not make them responsible for libelous publications appearing in the paper, unless it is shown that they in some way aided and assisted and advised its publication or circulation, or unless their duties as officers of the concern were of such character as charges them with the performance

⁴² The statement of facts is rewritten and part of the opinion is omitted.

of functions concerning the publication and circulation of the paper; such duties being of such nature that the law would imply that such officer knew or should have known of the publication of the libelous matter."

It is laid down by all the text writers that the proprietor, publisher, editor, author, and printer are severally and jointly liable. 13 Am. & Eng. Enc. Law, 372; Fras. Lib. 7-9, and notes; Odger, Sland. & L. 150; Newell, Defam. 239; Townsh. Sland. & L. 115, note 1. This liability attaches to the editor upon the theory that the matter is constructively under his supervision, and neither the editor nor proprietor is allowed to plead in defense that he is ignorant of the publication. Merrill, Newsp. Lib. 53. While evidence that the defendant did not actually or constructively participate in the publication may be introduced, neither the editor, publisher, nor proprietor can defend on the ground merely that he did not know about the libel until after it was published. Id. 259. Publisher and managing editor are treated alike by the standard text writers. This appears to be so elementary that the question has rarely, in recent years, been presented to the courts for consideration. In *Watts v. Fraser*, a case decided in 1837 in the Court of King's Bench, and reported in 7 Adol. & E. 223, both the editor and printer were held liable, though, as said in Fras. Lib. p. 10, they had no knowledge whatever of the publication. It is said in Townsh. Sland. & L. § 235, that the publisher is liable on proof of publication, but, when the editor is sued, he can be held liable only on proof that he personally aided or procured the publication of the article.

This is in conflict with the note at section 115 and the case cited to support the text. *Reg. v. Ramsey*, 15 Cox, Cr. Cas. 231, was decided under a statute which changed the rule in criminal cases. It was there held that by Campbell's libel act (6 & 7 Vict. c. 96, § 7) the law as it had theretofore existed, that the editor was liable both civilly and criminally for what appeared in the paper, though published without his knowledge, had been so changed as to render want of knowledge or consent a defense in trials on indictment. This case was decided in 1883, and shows that in civil actions in England the law remains as formerly; the managing editor is liable without proof of knowledge of or consent to the publication of the libel. To the same effect is *Nevin v. Spieckermann* (decided in the Supreme Court of Pennsylvania in 1886) 4 Atl. 497, where it is held that the general manager of a newspaper published by a corporation, the one who looks after the editorial work, is liable; also, *Weil v. Nevin* (Sup. Ct. Pa.) 1 Mona. 65, where an attempt was made to

extend the rule to the assistant editor, and it was held that, "though the general editor may be bound to know of what goes into the paper of which he is the supervisor, not so the assistant editor, for his work is limited."

From the foregoing we reach this conclusion: The law is well settled that the managing editor of a newspaper is equally liable with the proprietor and publisher for the consequences, in a civil action, for the publication of a libelous article; and this is so whether he knows of the publication or not, for it is his business to know, and mere want of knowledge constitutes no defense. To be sure, there is evidence in this case tending to show that the defendant was only editor in a particular department, and had no control over the department in which the articles complained of appeared; but, on the whole case, it is quite clear that the question should have been submitted to the jury under proper instructions to the effect that, if he was the general or managing editor of the paper, he is responsible for the consequences of the libelous publication, whether he knew of it or not. We assume, from an examination of the case and the manner it was presented in this court, that the learned trial judge based his ruling, in directing a verdict in defendant's favor, upon the theory that mere want of knowledge on the part of the editor of the libelous publication constitutes a defense. This was error, for which the judgment [which was for the defendant] must be reversed.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.⁴³

FOLWELL v. MILLER et al.

(Circuit Court of Appeals of the United States, Second Circuit, 1906.
145 Fed. 495, 75 C. C. A. 489, 10 L. R. A. [N. S.] 332,
7 Ann. Cas. 455.)

WALLACE, Circuit Judge.⁴⁴ The trial judge in the court below directed a verdict for the defendant, upon the ground that it appeared by the evidence that the defendant had not participated in the publication of the libel which was the subject of the action. The principal assignment of error challenges the correctness of this ruling.

The facts proved upon the trial were these: The libel was

⁴³ It should be observed that the responsibility was placed upon the defendant, not because he was president of the corporation that owned the paper, but rather because he was the *managing editor* of the paper.

⁴⁴ Part of the opinion is omitted.

published in the New York Times, a newspaper owned by a corporation in which the defendant was the principal stockholder, and of which he was the president. The defendant was also at the time editor in chief of the newspaper, having general supervision of the editorial and news departments; but the news department was under the immediate charge of a subordinate editor. The libel consisted of a news item, which was received by the news editor during the night of April 5th, and was published in the issue which went to press on the morning of April 6th. The defendant was absent during the period covered by the reception and the publication of the libel from the editorial rooms and the building in which the newspaper was printed, and had no knowledge of the publication until a subsequent day.

That the defendant was not liable merely because he was president of the corporation and a stockholder is a proposition which does not require extended discussion. The president of the corporation is an agent of very extensive, but not unlimited, powers. He is not personally liable because of his official capacity, any more than are the directors or stockholders, for torts committed by the corporation, in the absence of personal participation in the tortious act. As an agent, he is not liable for the acts of misfeasance or nonfeasance of his subordinate agents or employés. *Bath v. Caton*, 37 Mich. 199; *Paper Co. v. Dean*, 123 Mass. 267; *Brown v. Lent*, 20 Vt. 529; *Murray v. Usher*, 117 N. Y. 542, 23 N. E. 564; *Nat. Cash. Reg. Co. v. Leland*, 94 Fed. 502, 37 C. A. 372; *Arthur v. Griswold*, 55 N. Y. 400.

Whether the defendant was liable because of his relation to the newspaper as editor in chief, notwithstanding the libel was published without his knowledge or complicity, is a more debatable question. If that relation is one in which the editor is merely an agent and the proprietor is the principal, and the liability of the editor is to be tested by the ordinary rules of the law of principal and agent, it is plain, as has been already stated, that he would not be liable for any tortious act committed without his privity by another agent of the principal, whether such other agent be one of higher or lower grade. On the other hand, if the liability of the editor is coextensive with that of the proprietor, it is not affected or qualified by the circumstance that the publication was made without any personal participation on his part. It has long been the settled rule that when a libel is published in a newspaper the fact alone is sufficient evidence to charge the proprietor with the guilt of its publication, and he is not permitted to show in exculpation that he was not privy nor assenting to, nor encouraging, the publication. Although it

may have been published, contrary to his express orders, by a servant, if this was in the usual course of the servant's employment, the proprietor is liable. *Rex v. Gutch*, 1 Moody & Malkin, 433; *Rex v. Walter*, 3 Esp. 21; *Bruce v. Reed*, 104 Pa. 414, 49 Am. Rep. 586; *Andres v. Wells*, 7 Johns. 260, 5 Am. Dec. 267.

It has never been distinctly decided that the liability of the editor is coextensive with that of the proprietor. Some of the text-writers indulge in general statements which imply that the liability is coextensive, but the authorities which they cite do not justify the implication. The only carefully considered adjudication upon the point which we have been able to find is *Smith v. Utley*, 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620. In that case the court declared: "That the managing editor of a newspaper is equally liable with the proprietor and publisher for the consequences in a civil action for the publication of the libelous article; and this is so whether he knew of the publication or not, for it is his business to know, and mere want of knowledge constitutes no defense."

The opinion cites the statements of the text-writers and the authorities referred to by them, together with some later authorities. Some of these authorities are of trivial importance. One is *Watts v. Fraser*, 7 Adol. & E. 223, where both editor and printer were held liable for a libelous illustration, although it was published without their knowledge; but the editor was also the proprietor of the magazine in which it was published. *Nevin v. Speickermann* (Pa.) 4 Atl. 497, is another. But it did not appear in that case that the defendant was an editor, and the court merely approved an instruction to the jury: "That his being an officer of the corporation merely would not make him liable for the libelous publication, but if he was engaged in the general management of the paper, he would be liable if the publication was unjustified."

All that *Smith v. Utley* really decides is that the fact that a libel is published without any authority from, and without the knowledge of, a managing editor will not relieve him from liability when it appears that he was actively engaged in his duties as such editor at the time the libel was published. The reasoning of the opinion, however, is to the effect that publisher and editor stand alike in responsibility for the publication. Another adjudication in which it was incidentally decided that the editor's liability is coextensive with that of the proprietor is *Hunt v. Bennett*, 19 N. Y. 173, 175. In that case the point was raised that the allegation in the complaint that the defendant was the proprietor of the news-

paper in which the libelous article was published, without alleging that he published it, or was concerned in its publication, was insufficient to charge him with the consequences. The court said: "It is enough to say in answer that it appeared upon the trial, without objection, that the defendant was the editor of the paper, and that the article complained of was written by his assistant. Instead, therefore, of allowing the objection to prevail, even if it was valid, it is our duty to conform the pleadings to the facts proved."

Notwithstanding these adjudications, we are not convinced that the editor's liability is commensurate with that of the proprietor. Of course, he is liable equally with the proprietor when he has personally assisted in any manner in the preparation, revision, or otherwise of the publication of the libel. There is doubtless a presumption of fact that the managing editor has supervised the contents of the newspaper, and performed the duties of his office in that behalf. So doubtless when it appears that he has actually done so, the fact that he has omitted to notice some of the contents will not relieve him from the consequences of his participation. But when it appears affirmatively that he was not on duty during any part of the time between the reception of the libelous matter by the newspaper and the publication, and could not have had any actual part in composing or publishing, we think he cannot be held liable without disregarding the settled rule of law by which no man is bound for the tortious act of another over whom he has not a master's power of control. The action of libel is not based upon neglect of duty, but is for a positive tort; and there is no reason upon which an editor, any more than any other individual, can be held responsible for such a tort when it appears that he was actually innocent of all complicity in it.

It may be true that the moral responsibility of the managing editor of a modern newspaper for the publication of a libel is as great as that of the proprietor. Except upon questions of large policy, the editor in chief is usually supreme in controlling what shall and shall not be published in the newspaper, and ordinarily the proprietor delegates to him almost untrammelled power in that behalf. Indeed it is safe to say that generally the proprietor is the more innocent of the two for the publication of the libelous matter. The Penal Code of this state recognizes the liability of each as identical, and its provisions are that every editor or proprietor of a book, newspaper, or serial "is chargeable with the publication of any matter contained in such book, newspaper, or serial," and that in a prosecution for libel it is not a defense that the matter complained of was published without his

knowledge or fault, and against his wishes by another who had no authority from him to make the publication, unless the "act was disavowed by him as soon as known." Section 246, Pen. Code.

But in civil actions legal liability and moral responsibility are not always coincident. The owner of the newspaper is liable for whatever may be published in it, because all those who are engaged in preparing and publishing it are his servants, and the publication is an act within the scope of their employment. It is therefore deemed the act of the owner himself, and, although done without his knowledge, or contrary to his express instructions, he must bear the consequences. The same principle applies to every tort committed by a servant in the course of his employment, whether it is a mere neglect or a tort of a willful and malicious quality. The editor, however, exercises a delegated authority for the owner, and consequently is but an agent of the owner, even though he be the editor in chief. His subordinates are not his agents or servants, because the power to select them and discharge them belongs to the owner, and they are not under his control when that power resides in a higher agent, notwithstanding he is permitted to control them when the owner does not see fit to intervene. It is impossible to differentiate the relation of an editor and proprietor from that of an agent and principal. We conclude that the trial judge correctly ruled that the defendant was not liable for the act of his subordinate under the circumstances of this case. * * *

The court below properly directed a verdict for the defendant, and accordingly the judgment is affirmed.⁴⁵

⁴⁵ It should be noted that the defendant, though he was editor in chief of the paper, was not on active duty when the issue which contained the libelous article was published.

Compare *World Publishing Co. v. Minahan* (Okla. Sup.) 173 Pac. 815, L. R. A. 1918F, 283, holding the managing editor, who was one of the officers of the publishing company, a corporation, equally liable with the corporation even though he did not know of the publication of the particular libel, on the special ground that it appeared that he had active charge and control of the management, conduct, and policy of the paper, and hired and discharged the reporters. The court distinguished the case of *Folwell v. Miller*, 145 Fed. 495, 75 C. C. A. 489, 10 L. R. A. (N. S.) 332, 7 Ann. Cas. 455, on the ground that in the instant case the editor was exercising all of the authority of a proprietor, while in the *Folwell* Case he did not have such large responsibility.

Phillipine Commission Act, No. 277, § 6: "Every author, editor, or proprietor of any book, newspaper or serial publication is chargeable with the publication of any words contained in any part of such book or number of each newspaper or serial as fully as if he were the author of the same."

PEOPLE v. FULLER.

(Supreme Court of Illinois, 1909. 238 Ill. 116, 87 N. E. 336.)

Fuller was indicted for criminal libel in the circuit court of Lee county and upon trial was convicted and sentenced to pay a fine of \$200 and costs. This conviction was affirmed by the Appellate Court, and a writ of error was thereafter sent out from this court. The indictment charged the defendant with publishing in a newspaper, called the Dixon Daily Sun, a false, defamatory and malicious libel concerning one Walter B. Merriman, the county treasurer. The article accused him of theft of the public funds.

CARTER, J. * * * ⁴⁶ The further contention is made that plaintiff in error is not liable for the publication; that it was made by the Dixon Sun Company, of which he was only an employé; that while he wrote the article he did not write the headlines, but that they were written by another employé, and he knew nothing about them until they were published. The article was first published in the Dixon Daily Sun of October 31, 1906. It was again published as a supplement or insert in the edition of November 3d. The plaintiff in error was president of the corporation, a director and stockholder therein, editor in chief and part owner of the paper, directing its policy and exercising a general supervision. He wrote the article in question and delivered it to H. E. Ward, who was the managing editor, having charge of the mechanical department. Ward wrote the headlines, and plaintiff in error apparently did not see or know of them until he saw the same in print the evening of the publication. Afterward, however, the supplement containing the article and headlines was published in the issue of November 3d, with plaintiff in error's knowledge, and he helped to mail it. Even if he was not responsible for the headlines of the article on the first publication, there can be no doubt of his full responsibility for the second publication, including the headlines. * *

Objection is made that several of the instructions authorize a verdict of guilty upon proof that the plaintiff in error, by his criminal negligence only, permitted the publication of the libel. It is the duty of the editor and publisher of a newspaper to use reasonable precaution to see that no libels are published. He is criminally liable unless the unlawful publication was made under such circumstances as to negate any suggestion of privity or connivance on his part or want of ordinary care to prevent it. It is not enough to

⁴⁶ The statement of facts is rewritten and parts of the opinion are omitted.

show that he has never seen the libel or was not aware of it until it was pointed out to him. *Commonwealth v. Morgan*, 107 Mass. 199; *State v. Mason*, 26 Or. 273, 38 Pac. 130, 26 L. R. A. 779, 46 Am. St. Rep. 629. Proof of publication through the criminal negligence of the editor and manager to exercise proper care and supervision over his subordinates, or criminal indifference to the character of the articles appearing in the paper, will sustain a charge of unlawful, malicious, and willful publication. * * *

Judgment [of conviction] affirmed.

CHAPTER IV

RIGHT OF PRIVACY

1. **Subject a New One.**—Is there any liability for the publication of a person's photograph, where it is unconnected with libelous statements or associations? This question points more to the future than to the past. Authority upon it is scant. But in its larger aspects it has figured sufficiently in litigation, in legislative enactment, and in legal literature to render it a question of substantial and probably of growing moment.

In all there are two statutes, five cases, and one important article that we can turn to for an answer. Among these authorities California is the only one that has dealt with it explicitly as a problem in the field of journalism. It is there provided by statute as follows:

"It shall be unlawful to publish in any newspaper, handbill, poster, book, or serial publication or supplement thereto, the portrait of any living person, a resident of California, other than that of a person holding a public office in this state, without the written consent of such person first had and obtained. * * * All persons concerned in such unlawful publication either as owner, manager, editor, or publisher, or engraver, are each liable for said publication."¹

In New York the question was first raised in the field of commercial advertising. A flour-milling company printed lithographic likenesses of a young woman, bearing the words "Flour of the Family," and used them without her consent to advertise its goods. The court denied her an injunction, on the ground that no right known to the common law had been infringed, but expressed sympathy for her cause and suggested that, if such acts were to be legally condemned, it would have to come through legisla-

¹ Pen. Code Cal. 1909, § 258.

tive enactment. As a result of this decision² the following act was passed:

"A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor, of his or her parent or guardian, is guilty of misdemeanor."³

PAVESICH v. NEW ENGLAND LIFE INS. CO. et al.

(Supreme Court of Georgia, 1905. 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann Cas. 561).

Action for damages.

Paolo Pavesich brought an action against the New England Mutual Life Insurance Company, a nonresident corporation, Thomas B. Lumpkin, its general agent, and J. Q. Adams, a photographer, both residing in the city of Atlanta. The allegations of the petition were, in substance, as follows: In an issue of the Atlanta Constitution, a newspaper published in the city of Atlanta, there appeared a likeness of the plaintiff, which would be easily recognized by his friends and acquaintances, placed by the side of the likeness of an ill-dressed and sickly looking person. Above the likeness of the plaintiff were the words: "Do it now. The man who did." Above the likeness of the other person were the words: "Do it while you can. The man who didn't." Below the two pictures were the words: "These two pictures tell their own story." Under the plaintiff's picture the following appeared: "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and to-day my family is protected and I am drawing an annual dividend on my paid-up policies." Under the other person's picture was a statement to the effect that he had not taken insurance, and now realized his mistake. The statements were signed, "Thomas B. Lumpkin, General Agent."

The picture of the plaintiff was taken from a negative obtained by the defendant Lumpkin, or some one by him authorized, from the defendant Adams, which was used with his consent, and with knowledge of the purpose for which it

² Roberson v. Rochester Folding Box Co., 64 App. Div. 30, 71 N. Y. Supp. 876, *infra*, p. 249.

³ Laws N. Y. 1903, c. 132, § 1. Section 2 of the act provides the equitable remedy of injunction and an action for damages.

was to be used. The picture was made from the negative without the plaintiff's consent, at the instance of the defendant insurance company, through its agent Lumpkin. Plaintiff is an artist by profession, and the publication is peculiarly offensive to him. The statement attributed to plaintiff in the publication is false and malicious. He never made any such statement, and has not, and never has had, a policy of life insurance with the defendant company. The publication is malicious, and tends to bring plaintiff into ridicule before the world, and especially with his friends and acquaintances, who know that he has no policy in the defendant company. The publication is a "trespass-upon plaintiff's right of privacy and was caused by breach of confidence and trust reposed" in the defendant Adams. The prayer was for damages in the sum of \$25,000.

The petition was demurred to generally, and specially on the grounds that there was a misjoinder of defendants and causes of action, that no facts were set forth from which malice can be inferred, and that no special damages were alleged. The court sustained the general demurrer, and the plaintiff excepted.

COBB, J.⁴ The petition really contains two counts—one for a libel, and the other for a violation of the plaintiff's right of privacy. There was no special demurrer raising the objection that the counts were not properly arranged, as there was in *Cooper v. Portner Brewing Company*, 112 Ga. 894, 38 S. E. 91; and hence the petition is to be dealt with in relation to its substance, without reference to its form.

We will first deal with the general demurrer to the second count, which claimed damages on account of an alleged violation of the plaintiff's right of privacy. The question therefore to be determined is whether an individual has a right of privacy which he can enforce, and which the courts will protect against invasion. It is to be conceded that prior to 1890 every adjudicated case, both in this country and in England, which might be said to have involved a right of privacy, was not based upon the existence of such right, but was founded upon a supposed right of property, or a breach of trust or confidence, or the like, and that therefore a claim to a right of privacy, independent of a property or contractual right, or some right of a similar nature, had, up to that time, never been recognized in terms in any decision. The entire absence for a long period of time, even for centuries, of a precedent for an asserted right should have the effect to cause the courts to proceed with caution before recognizing the right, for fear

⁴ Parts of the opinion are omitted.

that they may thereby invade the province of the lawmaking power; but such absence, even for all time, is not conclusive of the question as to the existence of the right. The novelty of the complaint is no objection, when an injury cognizable by law is shown to have been inflicted on the plaintiff. In such a case, "although there be no precedent, the common law will judge according to the law of nature and the public good." Where the case is new in principle, the courts have no authority to give a remedy, no matter how great the grievance; but where the case is only new in instance, and the sole question is upon the application of a recognized principle to a new case, "it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago." Broom's Legal Maxims (8th Ed.) 193. This results from the application of the maxim, "*Ubi jus ibi remedium*," which finds expression in our Code, where it is declared that "for every right there shall be a remedy, and every court having jurisdiction of the one may, if necessary, frame the other." Civ. Code 1895, § 4929.

The individual surrenders to society many rights and privileges which he would be free to exercise in a state of nature, in exchange for the benefits which he receives as a member of society. But he is not presumed to surrender all those rights, and the public has no more right, without his consent, to invade the domain of those rights which it is necessarily to be presumed he has reserved, than he has to violate the valid regulations of the organized government under which he lives. The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private, and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law. This idea is embraced in the Roman's conception of justice, which "was not simply the external legality of acts, but the accord of external acts with the precepts of the law, prompted by internal impulse and free volition." McKeldey's Roman Law (Dropsie) § 123. It may be said to arise out of those laws sometimes characterized as "immutable," "because they are natural, and so just at all times and in all places that no authority can either change or abolish them." 1 Domat's Civil Law by Strahan (Cushing's Ed.) p. 49. It is one of those

rights referred to by some law writers as "absolute"—"such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." 1 Bl. 123. Among the absolute rights referred to by the commentator just cited is the right of personal security and the right of personal liberty. In the first is embraced a person's right to a "legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation"; and in the second is embraced "the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Bl. 129, 134.

While neither Sir William Blackstone nor any of the other writers on the principles of the common law have referred in terms to the right of privacy, the illustrations given by them as to what would be a violation of the absolute rights of individuals are not to be taken as exhaustive, but the language should be allowed to include any instance of a violation of such rights which is clearly within the true meaning and intent of the words used to declare the principle. When the law guarantees to one the right to the enjoyment of his life, it gives to him something more than the mere right to breathe and exist. While, of course, the most flagrant violation of this right would be deprivation of life, yet life itself may be spared, and the enjoyment of life entirely destroyed. An individual has a right to enjoy life in any way that may be most agreeable and pleasant to him, according to his temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbor, or violate public law or policy. The right of personal security is not fully accorded by allowing an individual to go through life in possession of all of his members, and his body unmarred; nor is his right to personal liberty fully accorded by merely allowing him to remain out of jail, or free from other physical restraints. The liberty which he derives from natural law, and which is recognized by municipal law, embraces far more than freedom from physical restraint. The term "liberty" is not to be so dwarfed, "but is deemed to embrace the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. 'Liberty,' in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and

to pursue any lawful trade or avocation." See Brannon on Fourteenth Amendment, 111.

Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public. One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters, and of publicity as to others. One may wish to live a life of toil, where his work is of a nature that keeps him constantly before the public gaze, while another may wish to live a life of research and contemplation, only moving before the public at such times and under such circumstances as may be necessary to his actual existence. Each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him his liberty. See, in this connection, Cyc. Law Dict. (Shumaker & Longsdorff), and Bouvier's Law Dict., tit. "Liberty." All will admit that the individual who desires to live a life of seclusion cannot be compelled, against his consent, to exhibit his person in any public place, unless such exhibition is demanded by the law of the land. He may be required to come from his place of seclusion to perform public duties—to serve as a juror and to testify as a witness, and the like; but, when the public duty is once performed, if he exercises his liberty to go again into seclusion, no one can deny him the right.

One who desires to live a life of partial seclusion has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze. Subject to the limitation above referred to, the body of a person cannot be put on exhibition at any time or at any place without his consent. The right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law, is also embraced within the right of personal liberty. Publicity in one instance, and privacy in the other, are each guaranteed. If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy, and this is no new idea in Georgia law. In *Wallace v. Railway Company*, 94 Ga. 732, 22 S. E. 579, it was said: "Liberty of speech and of writing is secured by the Constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred." The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this state by the Constitutions of the United States and

of the state of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law. * * *

It seems that the first case in this country where the right of privacy was invoked as the foundation for an application to the courts for relief was the unreported case of *Manola v. Stevens*, which was an application for injunction to the Supreme Court of New York, filed on June 15, 1890. The complainant alleged that while she was playing in the Broadway Theatre, dressed as required by her role, she was, by means of a flash light, photographed surreptitiously and without her consent, from one of the boxes, by the defendant, and she prayed that an injunction issue to restrain the use of the photograph. An interlocutory injunction was granted *ex parte*. At the time set for a hearing there was no appearance for the defendant, and the injunction was made permanent. See 4 *Harv. Law Rev.* 195, note 7. The article in this magazine which refers to the case above mentioned appeared in 1890, and was written by Samuel D. Warren and Louis D. Brandeis. In it the authors ably and forcefully maintained the existence of a right of privacy, and the article attracted much attention at the time. It was conceded by the authors that there was no decided case in which the right of privacy was distinctly asserted and recognized, but it was asserted that there were many cases from which it would appear that this right really existed, although the judgment in each case was put upon other grounds when the plaintiff was granted the relief prayed. * * *

In *Roberson v. Rochester Folding Box Company* (1901) 64 App. Div. 30, 71 N. Y. Supp. 876, decided by the Appellate Division of the Supreme Court of New York, it appeared that lithographic likenesses of a young woman, bearing the words "Flour of the Family," were, without her consent, printed and used by a flour milling company to advertise its goods. The declaration alleged that in consequence of the circulation of such lithographs the plaintiff's good name had been attacked, and she had been greatly humiliated and made sick, and been obliged to employ a physician, and prayed for an injunction against the further use of the lithographs and for damages. It was held that the declaration was not demurrable. It was also held that, if a right of property was necessary to entitle the plaintiff to maintain the action, the case might stand upon the right of property which every one has in his own body. This case came before the Court of Appeals of New York in 1902, and the judgment was reversed. 171 N. Y. 540, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828. This is the first and only decision by a court of

last resort involving directly the existence of a right of privacy. The decision was by a divided court; Chief Judge Parker and three of the Associate Judges concurring in a ruling that the complaint set forth no cause of action either at law or in equity, while Judge Gray, with whom concurred two of the Associate Judges, filed a dissenting opinion, in which it was maintained that the injunction should have been granted. While the ruling of the majority is limited in its effect to the unwarranted publication of the picture of another for advertising purposes, the reasoning of Judge Parker goes to the extent of denying the existence in the law of a right of privacy "founded upon the claim that a man has a right to pass through this world without having his picture published, his business enterprises discussed, or his eccentricities commented upon, whether the comment be favorable or otherwise."

The reasoning of the majority is, in substance, that there is no decided case either in England or in this country in which such a right is distinctly recognized; that every case that might be relied on to establish the right was placed expressly upon other grounds, not involving the application of this right in any sense; that the right is not referred to by the commentators and writers upon the common law or the principles of equity; that the existence of the right is not to be legitimately inferred from anything that is said by any of such writers; and that a recognition of the existence of the right would bring about a vast amount of litigation; and that in many instances where the right would be asserted it would be difficult, if not impossible, to determine the line of demarkation between the plaintiff's right of privacy and the well-established rights of others and of the public. For these reasons the conclusion is reached that the right does not exist, has never existed, and cannot be enforced as a legal right.

We have no fault to find with what is said by the distinguished and learned judge who voiced the views of the majority as to the existence of decided cases, and agree with him in his analysis of the various cases which he reviews—that the judgment in each was based upon other grounds than the existence of a right of privacy. We also agree with him so far as he asserts that the writers upon the common law and the principles of equity do not in express terms refer to this right. But we are utterly at variance with him in his conclusion that the existence of this right cannot be legitimately inferred from what has been said by commentators upon the legal rights of individuals, and from expressions which have fallen from judges in their reasoning in cases where the exercise of the right was not directly involved. So far as the judgment in the case is based upon the argument *ab inconvenienti*, all that

is necessary to be said is that this argument has no place in the case if the right invoked has an existence in the law. But if it were proper to use this argument at all, it could be said with great force that as to certain matters the individual feels and knows that he has a right to exercise the liberty of privacy, and that he has a right to resent any invasion of this liberty, and, if the law will not protect him against invasion, the individual will, to protect himself and those to whom he owes protection, use those weapons with which nature has provided him, as well as those which the ingenuity of man has placed within his reach. Thus the peace and good order of society would be disturbed by each individual becoming a law unto himself to determine when and under what circumstances he should avenge the outrage which has been perpetrated upon him or a member of his family.

The true lawyer, when called to the discharge of judicial functions, has in all times, as a general rule, displayed remarkable conservatism; and, wherever it was legally possible to base a judgment upon principles which had been recognized by a long course of judicial decision, this has been done, in preference to applying a principle which might be considered novel. It was for this reason that the numerous cases both in England and in this country which really protected the right of privacy were not placed upon the existence of this right, but were allowed to rest upon principles derived from the law of property, trust, and contract. Any candid mind will, however, be compelled to concede that, in order to give relief in many of those cases, it required a severe strain to bring them within the recognized rules which were sought to be applied. The desire to avoid the novelty of recognizing a principle which had not been theretofore recognized was avoided in such cases by the novelty of straining a well-recognized principle to cover a state of facts to which it had never before been applied. This conservatism of the judiciary has sometimes unconsciously led judges to the conclusion that, because the case was novel, the right claimed did not exist.

With all due respect to Chief Judge Parker and his associates who concurred with him, we think the conclusion reached by them was the result of an unconscious yielding to the feeling of conservatism which naturally arises in the mind of a judge who faces a proposition which is novel. The valuable influence upon society and upon the welfare of the public of the conservatism of the lawyer, whether at the bar or upon the bench, cannot be overestimated; but this conservatism should not go to the extent of refusing to recognize a right which the instincts of nature prove to exist, and which noth-

ing in judicial decision, legal history, or writings upon the law can be called to demonstrate its nonexistence as a legal right.

We think that what should have been a proper judgment in the Roberson Case was that contended for by Judge Gray in his dissenting opinion, from which we quote as follows:

"The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone. Cooley, Torts, p. 29. The principle is fundamental and essential in organized society that every one, in exercising a personal right and in the use of his property, shall respect the rights and properties of others. He must so conduct himself, in the enjoyment of the rights and privileges which belong to him as a member of society, as that he shall prejudice no one in the possession and enjoyment of those which are exclusively his. When, as here, there is an alleged invasion of some personal right or privilege, the absence of exact precedent, and the fact that early commentators upon the common law have no discussion upon the subject, are of no material importance in awarding equitable relief. That the exercise of the preventive power of a court of equity is demanded in a novel case is not a fatal objection. * * *

"As I have suggested, that the exercise of this peculiar preventive power of a court of equity is not found in some precisely analogous case furnishes no valid objection at all to the assumption of jurisdiction, if the particular circumstances of the case show the performance or the threatened performance of an act by a defendant which is wrongful, because constituting an invasion, in some novel form, of a right to something which is or should be conceded to be the plaintiff's, and as to which the law provides no adequate remedy. It would be a justifiable exercise of power, whether the principle of interference be rested upon analogy to some established common-law principle, or whether it is one of natural justice."

"Instantaneous photography is a modern invention, and affords the means of securing a portraiture of an individual's face and form in invitum their owner. While, so far forth as it merely does that, although a species of aggression, I concede it to be an irremediable and irrepressible feature of the social evolution. But if it is to be permitted that the portraiture may be put to commercial or other uses for gain, by the publication of prints therefrom, then an act of invasion of the individual's privacy results, possibly more formidable

and more painful in its consequences than an actual bodily assault might be. Security of person is as necessary as the security of property, and for that complete personal security which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain. The proposition is to me an inconceivable one that these defendants may unauthorizably use the likeness of this young woman upon their advertisement as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity. * * *

The effect of the reasoning of the learned judge whose words have just been quoted is to establish conclusively the correctness of the conclusion which we have reached, and we prefer to adopt as our own his reasoning, in his own words, rather than to paraphrase them into our own.

The decision of the Court of Appeals of New York in the Roberson Case gave rise to numerous articles in the different law magazines of high standing in the country—some by the editors and others by contributors. In some the conclusion of the majority of the court was approved, in others the views of the dissenting judges were commended, and in still others the case and similar cases were referred to as apparently establishing that the claim of the majority was correct, but regret was expressed that the necessity was such that the courts could not recognize the right asserted. An editorial in the *American Law Review* (volume 36, p. 636) said: "The decision under review shocks and wounds the ordinary sense of justice of mankind. We have heard it alluded to only in terms of regret." There were also articles referring to other cases cited which deal with the question as to the existence of a right of privacy. See 36 *Am. Law Rev.* 614, 634; 34 *Am. Law Reg. (N. S.)* 134; 41 *Id.* 669; 1 *Col. Law Rev.* 491; 2 *Id.* 437; 44 *Alb. Law J.* 428; 55 *Cent. L. J.* 123; 57 *Id.* 361. See, also, *North American Review* (September, 1902) 361; 22 *Am. & Eng. Enc. Law (2d Ed.)* 1311; note to *Roberson v. Box Co.* (N. Y.) 89 *Am. St. Rep.* 844; note to *Corliss v. Walker* (Mass.) 31 *L. R. A.* 283. Articles on the subject of the right of privacy have also appeared in 12 *Yale L. J.* 35, 24 *Nat. Corp. Rep.* 709, 25 *Nat. Corp. Rep.* 183, 415, 6 *Law Notes*, 79, and *Case and Comment*, 36 *Chicago L. N.* 126 (July, 1902); but these articles were not accessible to us at the time this opinion was written. * * *

The constitutional right to speak and print does not necessarily carry with it the right to reproduce the form and features of an individual. The plaintiff was in no sense a public character, even if a different rule in regard to the publication of one's picture should be applied to such characters. It is not necessary in this case to hold—nor are we prepared to do so—that the mere fact that a man has become what is called a public character, either by aspiring to public office, or by holding public office, or by exercising a profession which places him before the public, or by engaging in a business which has necessarily a public nature, gives to every one the right to print and circulate his picture. To use the language of Hooker, J., in *Atkinson v. Doherty*, *supra*: "We are loath to believe that the man who makes himself useful to mankind surrenders any right to privacy thereby, or that, because he permits his picture to be published by one person and for one purpose, he is forever thereafter precluded from enjoying any of his rights." It may be that the aspirant for public office, or one in official position, impliedly consents that the public may gaze not only upon him, but upon his picture, but we are not prepared now to hold that even this is true.

It would seem to us that even the President of the United States, in the lofty position which he occupies, has some rights in reference to matters of this kind which he does not forfeit by aspiring to or accepting the highest office within the gift of the people of the several states. While no person who has ever held this position, and probably no person who has ever held public office, has ever objected or ever will object to the reproduction of his picture in reputable newspapers, magazines, and periodicals, still it cannot be that the mere fact that a man aspires to public office or holds public office subjects him to the humiliation and mortification of having his picture displayed in places where he would never go to be gazed upon, at times when and under circumstances where if he were personally present the sensibilities of his nature would be severely shocked. If one's picture may be used by another for advertising purposes, it may be reproduced and exhibited anywhere. If it may be used in a newspaper, it may be used on a poster or a placard. It may be posted upon the walls of private dwellings or upon the streets. It may ornament the bar of the saloon keeper or decorate the walls of a brothel. By becoming a member of society, neither man nor woman can be presumed to have consented to such uses of the impression of their faces and features upon paper or upon canvas.

The conclusion reached by us seems to be so thoroughly in accord with natural justice, with the principles of the law of every civilized nation, and especially with the elastic prin-

ciples of the common law, and so thoroughly in harmony with those principles as molded under the influence of American institutions, that it seems strange to us that not only four of the judges of one of the most distinguished and learned courts of the Union, but also lawyers of learning and ability, have found an insurmountable, stumbling block in the path that leads to a recognition of the right which would give to persons like the plaintiff in this case and the young woman in the Roberson Case redress for the legal wrong, or what is by some of the law writers called the outrage, perpetrated by the unauthorized use of their pictures for advertising purposes.

What we have ruled cannot be in any sense construed as an abridgment of the liberty of speech and of the press as guaranteed in the Constitution. Whether the reproduction of a likeness of another which is free from caricature can in any sense be declared to be an exercise of the right to publish one's sentiments, certain it is that one who merely for advertising purposes, and from mercenary motives, publishes the likeness of another without his consent, cannot be said, in so doing, to have exercised the right to publish his sentiments. The publication of a good likeness of another, accompanying a libelous article, would give a right of action. The publication of a caricature is generally, if not always, a libel. Whether the right to print a good likeness of another is an incident to a right to express one's sentiments in reference to a subject with which the person whose likeness is published is connected, is a question upon which we cannot, under the present record, make any authoritative decision; but it would seem that a holding that the publication of a likeness under such circumstances without the consent of the person whose likeness is published is allowable would be giving to the word "sentiments" a very extended meaning. [The court here discusses the question of libel and holds the publication libelous.]

Judgment reversed. All the Justices concur.⁵

⁵ See, accord, *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076; *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532, L. R. A. 1918D, 1151 (a case where a motion picture of the plaintiff was taken and exhibited as part of an advertisement without her consent). A note in 28 Yale Law Journal, 269, approves *Kunz v. Allen*. See, contra, *Hillman v. Star Pub. Co.* (1911) 64 Wash. 691, 117 Pac. 594, 35 L. R. A. (N. S.) 595 (picture of plaintiff published along with that of her father, who at the time was arrested on charge of fraud). The court held that a statute is necessary to give relief in such cases. The court said: "We do not wish to be understood as belittling the complaint. We have no reason to doubt the feeling of annoyance alleged. Indeed, we sympathize with it, and marvel at the impertinence that does not respect it. We can only say that it is one of the ills that under the law cannot be redressed."

CHAPTER V

PUBLICATIONS IN CONTEMPT OF COURT

Points Involved: Note.—Comment upon court proceedings must be distinguished from the reporting of court proceedings. The problems connected with the reporting of such proceedings have been presented in Chapter III, section III, D, (1), *supra*. It was there brought out that the right to report did not include the right to comment. In the present chapter the limits upon the right to comment upon courts and court proceedings are considered.

1. Is it allowable to make any comment upon *pending* cases; i. e., cases before they have been finally decided?
2. Is it allowable to comment upon cases after they have been finally disposed of?

1. Comment on Pending Cases.—It is fundamental that those who are engaged in the administration of justice should be free from outside influence. "The first requisite of a court of justice is that its machinery be left undisturbed."¹ The judicial machinery is designed to exclude from consideration all facts and circumstances except those which are presented in a formal way under the scrutiny of the court. Jurors are often rejected if they have previously heard the facts or purported facts of the case, or comment upon them, especially if such knowledge has led them to form opinions. When finally chosen they are sworn to try the case according to the law as given them by the court and the facts admitted in evidence. It follows that any outside comment upon and criticism of a pending case, the court, the parties, the witnesses, or the facts, which is calculated in any way to influence the decision, is properly placed under legal ban. It is accordingly well-established law that any one who thus intrudes himself on the due and orderly administration of justice is guilty of contempt of court and may be called before the court and sub-

¹ Paterson, *Liberty of the Press, Speech and Public Worship*, 122.

jected to summary punishment. Charges of bias, incompetency, and bribery in relation to pending litigation clearly come within the rule here stated. They are regularly held to be "*calculated*" to "impede, embarrass, or obstruct the administration of justice."

The word "*calculated*" is used advisedly. It is not necessary that actual obstruction should be established.² Moreover, the truth of the charges will not excuse the offender. Says Justice Holmes in *Patterson v. Colorado*:³ "A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

2. Comment on Cases After They have been Decided.—The chief barrier to comment and criticism is removed as soon as a final decision is rendered in a case. The possibility of influencing the decision is no longer present, and, in general, freedom of criticism is recognized. But this freedom has its limits. Scurrilous and disrespectful attacks upon the court, imputing to it corruptness or gross incompetency, are unlawful, and lay the critic open either to an action or prosecution for libel or summary punishment for contempt. The latter remedy is not, however, allowed in all states. Some judges and some writers believe that the court should never resort to contempt proceedings, except for the protection of pending litigation, and that for subsequent scandalous attacks upon the court itself the redress afforded by the law of libel is adequate, and is very much to be preferred. It affords ample opportunity to call the critic to account, and relieves the court of the undesirable necessity of sitting as a judge virtually in his own case.

² *People v. Wilson et al.*, 64 Ill. 195, 16 Am. Rep. 528 (1872).

³ 205 U. S. 454, 27 Sup. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689 (1907).

PEOPLE v. WILSON et al.

(Supreme Court of Illinois, 1872. 64 Ill. 195.)

The defendants published in the Chicago Evening Journal an article insinuating that money was being used to induce and would induce a reversal of a murder case *pending* before the Supreme Court, adding: "The courts are now completely in the control of corrupt and mercenary shysters—the jackals of the legal profession—who feast and fatten on human blood spilled by the hands of other men."

LAWRENCE, C. J. The respondents, Charles L. Wilson and Andrew Shuman, have been placed under a rule to show cause why an attachment should not issue against them for contempt. * * *

The respondents [defendants] say the rule is that publications are a contempt only when they impede, embarrass or obstruct the administration of justice. The rule laid down by this court was, that they are a contempt when they are *calculated* to have that effect. The difference is radical, and marks precisely the difference between the guilt or innocence of the respondents in this case. They swear to a rule which would require us to say that we have actually been impeded, embarrassed or obstructed in the administration of justice, before we can hold the respondents guilty of contempt. The true test is, not whether the court has been weak or base enough to be actually influenced by a publication, but whether it was the object and tendency of the publication to produce such an effect.

It need hardly be said that we cannot accept, as a reason for discharging the rule, the disclaimer in the answers of any intentional disrespect or any design to embarrass the administration of justice. The meaning and intent of the respondents must be determined by a fair interpretation of the language they have used. They cannot now escape responsibility by claiming that their words did not mean what any reader must have understood them as meaning.

No candid man can deny that the article in question was well calculated to make upon the public mind the impression that the court, in a pending case, was influenced by money in its judicial action, and that it could be so influenced in other cases. Neither can it be denied that the article seeks to intimidate the court as to the judgment to be pronounced in a case then pending and involving the life or death of a human being. The article declares that the money raised for Rafferty "is operating splendidly," predicts that he will be granted a new trial, and avers that "the sum of fourteen hundred dol-

lars is enough nowadays to enable a man to purchase immunity from the consequences of any crime," and that "the courts are now completely in the control of corrupt and mercenary shysters—the jackals of the legal profession." This language will bear but one interpretation.

I shall not stop to cite and discuss the authorities bearing on the law of contempt, as that labor has been performed by another member of the court. I merely quote the rule as laid down by Bishop, an American writer, in his work on Criminal Law, section 216. He uses the following language: "According to the general doctrine, any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt."

Whether tested by this common-law definition or by the rule laid down by this court in the Case of Stuart, already cited, there is no room for doubt that the article in question must be held a contempt of flagrant character. It related to a case in court involving in its final issue a human life. The answers of the respondents [defendants] state that at the time of the publication "there was an intense excitement in the community, and particularly in the city of Chicago, on account of frequent murders, and the escape of the perpetrators thereof." This is no doubt true, and this article seems to have been studiously written, with a view to direct popular clamor against this court, and compel it either to affirm the judgment sending Rafferty to execution, or incur the imputation of bribery, and the clamor of an angry city to be echoed throughout the state by a portion of the Chicago press. The demand was not that we should calmly examine the record of Rafferty's trial to see whether his conviction had been legal, but that we should give him over to execution, because there was such impunity for crime in the city of Chicago that it was necessary some man should be immediately hung. We have since examined the record of this man's conviction, and reversed the judgment, all the members of the court holding that a plain provision of the statute had been violated on his trial.

Let us say here, and so plainly that our position can be misrepresented only by malice or gross stupidity, that we do not deprecate, nor should we claim the right to punish, any criticism the press may choose to publish upon our decisions, opinions, or official conduct in regard to cases that have passed from our jurisdiction, so long as our action is correctly stated, and our official integrity is not impeached. The respondents

are correct in saying in their answers that they have a right to examine the proceedings of any and every department of the government.

Far be it from us to deny that right. Such freedom of the press is indispensable to the preservation of the freedom of the people. But certainly neither these respondents nor any intelligent person connected with the press, and having a just idea of its responsibilities as well as its powers, will claim that it may seek to control the administration of justice or influence the decision of pending causes.

A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration; but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice. Even if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless a disturbing element has been thrown into the council chamber, which it is the wise policy of the law to exclude.

Regard it in whatever light we may, we cannot but consider the article in question *as calculated* to embarrass the administration of justice, whether it has in fact done so or not, and therefore as falling directly within the definition of punishable contempts, announced by this court in the case of *Stuart v. People*, 3 Scam. 395. It is a contempt, because, in a pending case of the gravest magnitude, it reflects upon the action of the court, impeaches its integrity, and seeks to intimidate it by the threat of popular clamor.

It may be said that, as long as the court was conscious it had not been frightened from its propriety by the article in question, the wiser course would have been to pass it by in silence.

So far as we are personally concerned, we should have preferred to do so. We desire no controversy with the press. But a majority of the court were of opinion that this publication could not be disregarded without infidelity to our duty. By our relations to the bar, to the suitors in our court, to the entire judiciary of the state, and to the state itself, we felt constrained to call the persons responsible for this publication to account.

It may further be said that this article could do no permanent injury to a court strong in the consciousness of its own integrity, and in the confidence reposed in it by the people, and

therefore the publication was unworthy of notice. It is quite true that a solitary paragraph, under ordinary circumstances, would have probably been innocuous. It is to be observed, however, that the answers of the respondents speak of the existing excitement in Chicago in regard to unpunished crime, and in that state of the public mind there was great probability that this article would win a ready credence, if permitted to go unchallenged. Public meetings had been held; committees had been appointed to aid in the suppression of crime. The papers of Chicago, circulating throughout the state and the Northwest, had called attention to this subject. It was made a frequent topic of discussion in the public prints, and when, finally, this article appeared, in a paper of noted sobriety and respectability, containing charges and imputations against this court, which were simply infamous, the majority of the court felt that it was necessary for the good name of the state, within and without its borders, and necessary in order to preserve the confidence of the people wholly unshaken in this court, to request the Attorney General to move for a rule against these respondents. The majority of the court still think they have acted wisely. We have been controlled by no feeling of personal malignity, and do not propose to inflict a severe punishment. We wish to call the attention of the press to the limits which circumscribe their comments on judicial proceedings, and to remind them of the obligations imposed upon them by the great power which they confessedly wield. Especially do we desire to keep the judicial reputation of the state free from the appearance of dishonor, and to prevent the growth of that distrust in the minds of our own people that would certainly follow the circulation of articles like the one under consideration, if permitted to go unrebuked.

The loss of public confidence in our integrity would be a calamity little less than the loss of official integrity itself. The pomp and circumstance which in England aid to clothe the courts and the law with dignity and power are not in consonance with our republican form of government. In this country the power of the judiciary rests upon the faith of the people in its integrity and intelligence. Take away this faith, and the moral influence of the courts is gone, and popular respect for law impaired. Law with us is an abstraction. It is personified in the courts as its ministers, but its efficacy depends upon the moral convictions of the people. When confidence in the courts is gone, respect for the law itself will speedily disappear, and society will become the prey of fraud, violence, and crime.

The one element in government and society which the American people desire, above all things else, to keep free from

the taint of suspicion, is the administration of justice in the courts. So long as this is kept pure, a community may undergo extreme misgovernment and still prosper. But when these tribunals have become corrupt, and public confidence in them is destroyed, the last calamity has come upon a people, and the object of its social organization has failed. The protection of life, liberty and property is the final aim of all government. This is accomplished by an honest administration of just laws. The people, by their representatives, may be relied upon to pass such laws; but unless they are honestly administered, neither life, liberty, nor property enjoys the security which it is the object of government and society to give. If the time shall unhappily ever come when the judiciary of this state has become hopelessly corrupt, and justice is bought and sold, the loss of its moral and material well-being will as certainly follow as the night follows the day.

We are glad to say that for more than half a century the judiciary of this state has not only enjoyed the confidence of the people, but also has received the support of the press. Never before, so far as the members of this court are aware, has the integrity of this tribunal been assailed by a public journal. The respectability of the paper in which the article in question has appeared, and the circumstances surrounding its publication, have given it a gravity which a casual article of like import would not possess. We have personally felt great reluctance to taking notice of the publication, but our consciousness of the mischief that may be done in embarrassing the administration of justice, and impairing the moral authority of the judiciary throughout the State, if this article is to stand as an unpunished precedent, has compelled us to issue the rule, and now compels us to order an attachment.

It is the judgment of a majority of the court that an attachment issue against Charles L. Wilson and Andrew Shuman, returnable forthwith.⁴

⁴ The statement of facts is rewritten and parts of the opinion of Lawrence, C. J., the concurring opinions of McAllister and Thornton, JJ., and the dissenting opinion of Scott, J., are omitted. The holding of the majority is that the defendants were in contempt of court.

STATE *ex inf.* CROW *v.* SHEPHERD.

(Supreme Court of Missouri, 1903. 177 Mo. 205, 260, 76 S. W. 79, 99 Am. St. Rep. 624.)

Proceeding for contempt on information of the Attorney General.

A damage suit against the Missouri Pacific Railroad, after many vicissitudes, was finally decided by the Supreme Court in favor of the railroad. The defendant, who was the publisher of the Standard-Herald, published an article in his paper in which he bitterly condemned the court and charged it with having been corrupted by the railroad company.

MARSHALL, J.⁵ * * * It is pertinent and profitable to set out a few of the cases wherein the courts of other jurisdictions have summarily punished persons as for a criminal contempt on account of publications which were calculated to bring public odium upon the court.

The case of *Respublica v. Oswald*, 1 Dall. 319, 1 L. Ed. 155, has already been referred to.

In *Respublica v. Passmore*, 3 Yeates, 441, 2 Am. Dec. 388, the defendant was fined \$50 and sent to jail for 30 days for publishing an article reflecting upon one of the parties to a pending cause, which tended to interfere with the course of justice.

In *People v. Freer*, 1 Caines, 518, the defendant published, in the *Ulster Gazette*, certain comments concerning a trial that had occurred in court, that were calculated to prejudice and influence the public mind against the court, and to intimidate and influence the court in deciding a motion for a new trial that was then pending. He was punished for contempt. The court said: "Publications scandalizing the court, or intending unduly to influence or overawe their deliberations, are attempts which they are authorized to punish by attachment; and, indeed, it is essential to their dignity of character, their utility and independence, that they should possess and exercise this authority."

In *Tenney's Case*, 23 N. H. 162, the defendant, who had no interest in a pending action, except that his son had sued one of the defendants and had lost, caused copies of the petition in the pending action, which contained serious charges against the defendants, to be published and circulated among persons with whom the defendants had business relations, in which he said he could stop the suit if the defendants would pay him \$1,000—that being the amount he said he had lost by his son's unsuccessful suit against the defendants. It was held that

⁵ Parts of the opinion are omitted.

"such conduct tended to obstruct the free course of justice, and was a contempt of court," and a rule in attachment was granted.

For publishing an account of a trial for treason when the court had forbidden any publication of it, because like cases were pending against other persons, whose rights might be affected, the defendant, as editor of the *Observer*, was fined £500 by the Court of King's Bench in England in 1821. *King v. Clement*, 4 Barn. & Ald. 218.

In *Sturoc's Case*, 48 N. H. 428, 97 Am. Dec. 626, the defendant, a member of the bar, was punished as for a criminal contempt for publishing a communication in a newspaper respecting a prosecution under the liquor laws of that state, which tended to prejudice the minds of the people against the case.

In *State v. Morrill*, 16 Ark. 384, the defendant, as editor of the *Des Arc Citizen*, published an article in which, by implication, he charged the judges of the Supreme Court of Arkansas with having been bribed to render a certain decision in a habeas corpus case that had been finally decided by that court. Upon the publication being called to the attention of the court by a communication addressed to one of the judges of the court by a member of the bar, the court issued a rule to show cause. The defendant pleaded the statute of that state prescribing that in certain instances, and no others, the court could punish for contempt. It was admitted that the act complained of did not fall within the terms of the statute, and it was claimed that the court had no power to punish for any other kind of a contempt than that specified in the statute. The statute was, in *ipsissimis verbis*, exactly like section 1616, Rev. St. Mo. 1899. It will be observed that the charge was practically the same in that case as in the case at bar, and that the statute relied on in that case is exactly like our statute. The court held the statute to be beyond the power of the Legislature to enact, and that the power to punish as for a criminal contempt was inherent in the court. The court also held, as stated in the headnote, that: "Any citizen has a right to comment upon the proceedings and decisions of this court, to discuss their correctness, and the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important trusts reposed in them; but he has no right, under the seventh section of the Bill of Rights, to attempt, by libelous publications, to degrade the tribunal, etc. Such publications are an abuse of the liberty of the press, for which he is responsible."⁶ It was also objected that it was

⁶ It is said further in *State v. Morrill*: "If a judge is really corrupt, and unworthy of the station which he holds, the Constitution

not a contempt of court, because it did not relate to a case then pending, and therefore the rights of no party litigant were affected by it. But the court referred to the adjudications—particularly *Commonwealth v. Dandridge*, 2 Va. Cas. 409, presently to be cited—and said: “The cases above cited (and many more might be cited if deemed at all necessary) abundantly show that by the common law courts possessed the power to punish as for contempt libelous publications of the character of the one under consideration, upon their proceedings, pending or past, upon the ground that they tended to degrade the tribunals, destroy public confidence and respect for their judgments and decrees, so essentially necessary to the good order and well-being of society, and most effectually obstructed the free course of justice.” Accordingly, the defendant was punished summarily as for a criminal contempt.

In *Commonwealth v. Dandridge*, 2 Va. Cas. 409, the court at a prior term had decided a case against the defendant. He met the judge at the door of the courthouse, before the opening of court for the next term, and grossly insulted him, charging him with corruption and cowardice in the decision of his case. He was cited for contempt, and it was objected that the act did not relate to a pending cause. The case was transferred to the general court of the state, and that court, speaking to this point, said: “Upon this part of the subject, and in reference to cases which have an indirect bearing on the present question, a distinction is attempted for which I can find neither reason nor authority. It is said that the attaching power may be exercised for contempts touching the prospective conduct of the judge, but not for such as touch his past conduct. In reason, I see but one pretense for this distinction. Threats and menaces of insult or injury to a judge in case he shall render a certain judgment may be considered as impairing his independence and impartiality in the particular case to which the threats refer. And, if the power of punishment stop here, a curious consequence may ensue. A man may be attached for threatening to do that for which he could not be attached when actually done. One says of a judge, ‘If he render a certain judgment against me, I will insult or beat him.’ For this he may be attached. But if (the judgment having been rendered) the insult be actually offered, an attachment no longer lies, because the contempt is in relation to the past conduct of the judge, and to a case no longer pending. A recurrence to original principles—the only true test—by

has provided an ample remedy by *impeachment* or *address*, where he can meet his accuser face to face, and his conduct may undergo a full investigation.”

demonstrating that the weight, authority, and independence of the court may be equally assailed either way, will prove that this distinction is merely ideal."

In the case of *In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747, the court finally decided a case, and the attorney for the losing party wrote a letter to the judge, saying the decision "is directly contrary to every principle of law governing injunctions, and everybody knows it, I believe. * * * It is my desire that no such decisions or orders shall stand unreversed in any court I practice in." The court held that it was a criminal contempt, fined him \$50, and suspended him from practice until the fine was paid, and the Supreme Court affirmed the judgment.

In the case of *In re Woolley*, 11 Bush (Ky.) 95, the defendant, as attorney for the losing party, filed a motion for rehearing, in which, in a supercilious and dogmatic style, he charged "that the court had overlooked the facts of the case; that it had assumed facts having no place in the proof, and ignored others which stood out on every page of the record; that it was careless and indifferent to the rights of a litigant, and that the result of this carelessness and indifference was a ruinous, disastrous, and unjust judgment against a party wholly innocent of all offense." The court pronounced the offense to be "of a nature too grave to be silently overlooked." The defendant was cited for contempt, and disclaimed, under oath, any intention to commit a contempt, and in consideration of this condition his fine was assessed at the nominal sum of \$30.

In *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528, the defendant, the editor of the Chicago Evening Journal, published, in 1872, an article with reference to a case then pending in the Supreme Court, in which he reflected on the action of the court in that case, impeached its integrity, and sought to intimidate the action of the court by threat of popular clamor. He was cited for criminal contempt, and fined \$100. In this case the court adopted the rule laid down by Bishop's Criminal Law, § 216, wherein it is said: "According to the general doctrine, any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt."

In the case of *In re Chadwick* (Mich.) 67 N. W. 1071, the defendant, as attorney for the losing party, in a case that had been decided by the Supreme Court of Michigan, wrote and published, in 1896, an article in the Port Huron News, criticising the decree, and in it charged the judge with unfairness

and improper conduct. The Supreme Court of Michigan held it to be a contempt of court, and that the power to punish for contempt existed as well after a case was finally disposed of as where it was still pending. The attachment was issued in this case upon a petition of the members of the bar informing the court of the contempt. * * *

The courts of this state have been conservative in the extreme, and forbearing to a fault. They have overlooked remarks concerning their acts, from lawyers and laymen, that were improper and outside of the pale of the law, preferring, if possible, to attribute the offense to the zeal of counsel or the excitement of the laymen, incident to disappointment of personal hopes and ambitions. They have been considerate of the feelings and character of others, and have many times abstained from the use of strong language, under trying provocation, in deciding cases. And it was proper to do so. But the protection and safety of life, liberty, property, and character, the peace of society, the proper administration of justice, and even the perpetuity of our institutions and form of government, imperatively demand that every one—lawyer, layman, citizen, stranger, newspaper man, friend or foe—shall treat the courts with proper respect; shall not attempt to degrade them, or impair the respect of the people, or destroy the faith of the people in them. When the temples of justice become polluted or are not kept pure and clean, the foundations of free government are undermined, and the institution itself threatened. The people have no fear of their courts abusing their power to punish for contempt or in any other respect. Alexander Hamilton, in advocating the adoption of the provisions of the federal Constitution relating to the judiciary, said: "Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution, because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The Legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse, no direction either of the strength or the wealth of society, and can take no active resolution whatever. It may be truly said to have neither force nor will, but merely judgment, and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty." *Federalist*, p. 355. This view is in-

dorsed by Judge Story in his treatise on the Constitution (volume 2, 4th Ed., p. 401).

It may well be said that courts depend, for their existence, usefulness, and efficacy, upon the consent of the people. They must depend, first, upon the loyalty, the intelligence, and the counsel of the bar to the people; second, upon the faithful communication by the high-minded, intelligent, and truthful members of the newspaper profession to the reading public, of their acts and conduct and judgments; and, third, upon the wisdom, the honesty, and the patriotism and sense of justice and fair play, of the great body of the people, who have established these institutions, clothed them with dignity and power, elected the judges to serve them as their judicial agents, and who have never failed, in the long run, to distinguish between right and wrong, between the true and the false, between the faithful and the faithless servants, and who have no patience with slanderers, or those who live by or feed upon slanders. To be a judge over such people is the highest honor that can be conferred upon mortal man. To be a judge, without such powers as a judge, were to be a kicking post for every madman, a butt for every idiot or knave, and, withal, an object of contempt of all men. Unfortunately, there must always be a losing as well as a winning party to every suit, and courts must needs inflict pain as well as impart joy by every judgment rendered. But the loser to-day may be the winner in another case to-morrow. And so, if every loser was privileged to go to the tavern and "cuss the court" to-day, he would necessarily have to retract his reproaches and praise the court to-morrow, when he is a winner. So it is in life. It is nearly always true that one man's loss is another man's gain. But life is not a failure, and business is not a fraud and to be condemned for such reasons. "Do unto others as ye would others should do unto you," do not bear false witness against your neighbor, keep the commandments, obey the laws, tell the truth, be honest to yourself as well as to your fellow man, bear no malice, but judge all men with charity, and life will be sweeter and more profitable, and the world will be better, and your neighbor's faults will not appear quite so unpardonable. In this spirit the judgment in this case was entered, and in this spirit let it be judged.

What is herein said in no manner whatever conflicts with what was said in *Marx & Haas Jeans Clothing Company v. Watson*, 168 Mo. 133, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440. That was a suit in equity to enjoin a boycott, and it was held that injunction would not lie to restrain the utterance of a libel or slander, or to restrain free speech. It was held there, as it is here, that every one may speak, write,

or publish what he will, but is responsible for the abuse of the privilege. 168 Mo. loc. cit. 150, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440. That case, as well as this, holds that the courts cannot prevent a man telling an untruth about another, but their power is limited to punishing him if he does so.

For these reasons, the defendant in this case was adjudged guilty of contempt.

ROBINSON, C. J., and BRACE, GANTT, BURGESS, VALLIANT, and FOX, JJ., concur.⁷

PATTERSON v. PEOPLE OF THE STATE OF COLORADO
EX REL. ATTORNEY GENERAL OF
THE STATE OF COLORADO.

(Supreme Court of the United States, 1907. 205 U. S. 454, 27 Sup. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689.)

Mr. Justice HOLMES delivered the opinion of the court:

This is a writ of error to review a judgment upon an information for contempt. 84 Pac. 912. The contempt alleged was the publication of certain articles and a cartoon, which, it was charged, reflected upon the motives and conduct of the supreme court of Colorado in cases still pending, and were intended to embarrass the court in the impartial administration of justice. * * *

The defense upon which the plaintiff in error most relies is raised by the allegation that the articles complained of are true, and the claim of the right to prove the truth. * * *

In the next place, the rule applied to criminal libel applies yet more clearly to contempts. A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

What is true with reference to a jury is true also with ref-

⁷ Accord: *Burdett v. Commonwealth*, 103 Va. 838, 48 S. E. 878, 68 L. R. A. 251, 106 Am. St. Rep. 916—"One kind of contempt is scandalizing the court itself." But compare *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158. See, also, in criticism of the rule that disrespectful comment upon a case, after it is ended, may constitute contempt, "The Courts and Free Speech," 8 Ill. Law Rev. 141.

erence to a court. Cases like the present are more likely to arise, no doubt, when there is a jury, and the publication may affect their judgment. Judges generally perhaps are less apprehensive that publications impugning their own reasoning or motives will interfere with their administration of the law. But if a court regards, as it may, a publication concerning a matter of law pending before it, as tending toward such an interference, it may punish it as in the instance put. When a case is finished courts are subject to the same criticism as other people; but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied. *Ex parte Terry*, 128 U. S. 289, 32 L. Ed. 405, 9 Sup. Ct. Rep. 77; *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280, 52 N. E. 445; *State v. Hart*, 24 W. Va. 416, 49 Am. Rep. 257; *Myers v. State*, 46 Ohio St. 473, 491, 15 Am. St. Rep. 638, 22 N. E. 43; *Hunt v. Clarke*, 58 L. J. Q. B. N. S. 490, 492; *King v. Parke* [1903] 2 K. B. 432. It is objected that the judges were sitting in their own case. But the grounds upon which contempts are punished are impersonal. *United States v. Shipp*, 203 U. S. 563, 574, 51 L. Ed. 319, 27 Sup. Ct. Rep. 165. No doubt judges naturally would be slower to punish when the contempt carried with it a personal dishonoring charge, but a man cannot expect to secure immunity from punishment by the proper tribunal, by adding to illegal conduct a personal attack. It only remains to add that the plaintiff in error [defendant in trial court] had his day in court and opportunity to be heard. We have scrutinized the case, but cannot say that it shows an infraction of rights under the Constitution of the United States, or discloses more than the formal appeal to that instrument in the answer to found the jurisdiction of this court.⁸

Writ of error dismissed.⁹

⁸ Parts of the opinion of Mr. Justice Holmes and the dissenting opinions of Mr. Justice Harlan and Mr. Justice Brewer are omitted.

⁹ An excellent note on the subject of contempt will be found in 50 Am. St. Rep. 572. Pen. Code Mont. 1895, subd. 7, § 293 (Rev. Codes 1921, § 10944), provides that "the publication of a false and grossly inaccurate report of the proceedings of any court" shall constitute contempt of court. To the same effect, see Gen. St. Minn. 1913, § 8582.

CHAPTER VI

CONSTITUTIONAL GUARANTIES OF THE FREEDOM OF THE PRESS AND MISCELLANEOUS STATUTES AND POSTAL REGULATIONS PROHIBITING THE PUBLICATION AND CIRCULATION OF PERNICIOUS WRITINGS

"And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?" —Milton, *Areopagitica*.

"Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties. —Milton, *Areopagitica*.

"I have sworn upon the Altar of God eternal hostility against every form of tyranny over the mind of man." —Thomas Jefferson.

"How does this vague, fluctuating, complex thing we call public opinion—omnipotent, yet indeterminate; a sovereign to whose voice every one listens, yet whose words, because he speaks with as many tongues as the waves of the boisterous sea, it is so hard to catch—how does public opinion express itself in America? By what organs is it declared, and how, since these organs often contradict one another, can it be discovered which of them speak most truly for the mass? The more completely popular sovereignty prevails in a country, so much the more important is it that the organs of opinion should be adequate to its expression, prompt, full, and unmistakable in their utterances. * * * The press, and particularly the newspaper press, stands by common consent first among the organs of opinion. * * * The conscience and common sense of the nation as a whole keep down the evils which have crept into the working of the Constitution, and may in time extinguish them. Public opinion is a sort of atmosphere, fresh, keen, and full of sunlight, like that of the American cities, and this sunlight kills many of those noxious germs which are hatched when politicians congregate. That which, carrying a once famous phrase, we may call the genius of universal publicity, has some disagreeable

results, but the wholesome ones are greater and more numerous. Selfishness, injustice, cruelty, tricks and jobs of all sorts, shun the light; to expose them is to defeat them. No serious evils, no rankling sore in the body politic, can remain long concealed, and, when disclosed, it is half destroyed. So long as the opinion of a nation is sound, the main lines of its policy cannot go far wrong. * * *¹

CONSTITUTION OF THE UNITED STATES, AMEND. I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

CONSTITUTION OF ILLINOIS, ART. II, § 4.

"Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty.
* * *"²

¹ Bryce, *The American Commonwealth* (New and Revised Edition) pp. 274, 275, 367.

The First Continental Congress in 1774 declared the importance of liberty of the press to consist "in the advancement of truth, science, morality, and arts in general, and in the diffusion of liberal sentiments on the administration of government, the ready communication of thought between subjects, and the consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs." Cited by Kent, J., in *People v. Croswell*, 3 Johns. Cas. (N. Y.) 337, 391.

² Other state Constitutions contain similar provisions; the only substantial variation in wording being found in West Virginia. Article III, § 7, of the Constitution of West Virginia provides: "No law abridging the freedom of speech, or of the press, shall be passed; but the Legislature may by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for recovery in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation."

For a more detailed analysis and summary of the provisions in the various states, see Stimson, *Federal and State Constitutions of the United States*, pp. 144, 145.

Bibliography on Freedom of Speech and of the Press.—"Law of the Constitution" (8th Ed.) Dicey, c. VI; "Constitutional History

1. Constitutional Provisions Relative to Freedom of the Press.—The federal Constitution and all of the state Constitutions provide in words or substance that no law shall be passed abridging the freedom of speech or of the press. Most of the state Constitutions differ, however, from the federal Constitution by adding that every person shall, notwithstanding, be responsible for the abuse of the liberty thus granted. But this difference is verbal only. This variation in phraseology has led to no difference of construction. The clause in the federal Constitution has invariably been subjected to a limitation similar to that expressed in the state Constitutions.

2. Effect of the Constitutional Provisions.—The effect of these provisions is to render any statute passed in conflict therewith void; the provision of the federal Constitution

of England" (2d Ed.) Erskine May, vol. 2, cc. IX and X; 2 Stephen, *History of Criminal Law*, c. XXIV; Cooley, *Constitutional Limitations* (7th Ed., 1903), pp. 596-658; "Freedom of Speech," Zechariah Chafee, Jr.; "Freedom of the Press in Massachusetts," C. A. Duniway; "Freedom of the Press in the United States," Henry Schofield, 9 *Publications of the American Sociological Society*, 67 (1914); "Restrictions on Freedom of the Press," 16 *Harv. Law Rev.* 55 (1902); "Free Speech and Free Press in Relation to the Police Power of the State," P. L. Edwards, 58 *Cent. Law J.* 383 (1904); "Federal Interference with the Freedom of the Press," Lindsay Rogers, 23 *Yale Law J.* 559 (1914); "Freedom of Speech and of the Press," 65 *Univ. of Pa. Law Rev.* 170 (1916); "Freedom of Speech and of the Press," W. R. Vance, 2 *Minn. Law Rev.* 239 (1918); "The Freedom of the Press," Jos. R. Long, 5 *Va. Law Rev.* 225 (1918).

As a war-time problem, the subject is discussed in the following articles: "The Espionage Act Cases," 32 *Harv. Law Rev.* 417 (1919); "Military Censorship and Freedom of the Press," 5 *Va. Law Rev.* 178 (1917); "Threats to Take the Life of the President," 32 *Harv. Law Rev.* 724 (1919); "The Vital Importance of a Liberal Construction of the Espionage Act," Alexander H. Robbins, 87 *Cent. Law J.* 145 (1918); "Law in War Time—1917," 31 *Harv. Law Rev.* 692, 696; "Freedom of Speech in War Time," Zechariah Chafee, Jr., 32 *Harv. Law Rev.* 932; "The Legal Theory of the Minnesota 'Safety Commission' Act," 3 *Minn. Law Rev.* 1; "Freedom of Speech and of the Press in War Time: The Espionage Act," 17 *Mich. Law Rev.* 621.

In this connection, attention is particularly called to the following nontechnical articles: "Freedom of Speech," Z. Chafee, Jr., 17 *New Republic*, 66 (Nov. 16, 1918); "Legislation Against Anarchy," Zechariah Chafee, Jr., 19 *New Republic*, 379 (July 23, 1919). "The Debs Case and Freedom of Speech," Ernst Freund, 19 *New Republic*, 13 (May 3, 1919); 19 *New Republic*, 151 (May 31, 1919); "Mr. Burleson, Espionagent," William Hard, 19 *New Republic*, 42 (May 10, 1919); "Mr. Burleson, Section 481½B," 19 *New Republic*, 76 (May 17, 1919); "The Trial of Eugene Debs," Max Eastman, *The Liberator* (Nov. 1918); Bury, "History of Freedom of Thought."

applying only to acts of Congress and the state constitutional provisions to acts of the states. Certain provisions of the federal Constitution apply both to Congress and to the states. Other provisions control the acts of Congress only. The freedom of speech and press amendment is in the latter class. It therefore does not affect state legislation.

3. Construction of the Constitutional Provisions.—Exactly how far do these constitutional guaranties leave the individual and the press unfettered? This question is more easily asked than answered.

It may be said at the outset that these provisions do not mean all that at first reading they might seem to mean, not all that the man in the street has been disposed to construe them to mean. Freedom of speech never has meant the unrestricted right to say what one pleases at all times and under all circumstances, any more than the right of freedom of action has meant the right to do with impunity whatever one might wish to do. An organized social or political group, dedicated to the freedom of the human race, can only grant to the individual the largest measure of liberty of action and utterance that is consistent with the well-being of the whole. "Every citizen has an equal right to use his mental endowments, as well as his property, in any harmless occupation or manner; but he has no right to use them so as to injure his fellow citizens or to endanger the vital interest of society. Immunity in the mischievous use is as inconsistent with civil liberty as prohibition of the harmless one." As has been frequently stated by the courts it is liberty, not license, that is guaranteed by the Constitution. But what is liberty and what is license?

"The Constitution supplies no definition of the term 'liberty of the press.' A right existing at the time the Constitution was adopted is guaranteed, the nature and extent of which must be ascertained by looking elsewhere. Frequently it is said that the expression was used in the sense it bears in the common law. If so, the question arises: The common law at what stage of its development? Certainly not the common law of England as it existed when first

transplanted to this country by our forefathers in the fourth year of the reign of King James I (1607). All printing was then subservient to royal proclamations and prohibitions, charters of privilege, license and monopoly, and decrees of the Court of Star Chamber. The newspaper proper did not appear until 1622, and the beginnings of the modern law of libel find their source in the Star Chamber decision *De Libellis Famosus*, rendered in 1609.

"Nothing like a definition could be framed from the law of England at any subsequent period. When the Court of Star Chamber was abolished (in 1641), Parliament assumed the prerogative respecting the licensing of publications which it had held, and the press did not become free from this restraint until 1694. Its liberty was then more theoretical than actual, on account of the harshness of the law of libel and the manner in which that law was administered in the courts. The long struggle against the courts, culminating in the passage of the libel law in 1792, with which the names of Fox, Erskine, and Camden are so honorably and brilliantly associated, is familiar history. The statutes *De Scandalis Magnatum* were not formally repealed until 1887, although prosecutions under them ceased long before. A species of censorship survives in the act of 1843, requiring new plays to be submitted to the lord chamberlain for examination and approval, and the present state of the law of England on the subject of defamation is described in an essay, 'The History and Theory of the Law of Defamation,' in volume 3 of the *Columbia Law Review*, as follows:

"Unfortunately the English law of defamation is not the deliberate product of any period. It is a mass which has grown by accretion, with very little intervention from legislation, and special and peculiar circumstances have from time to time shaped its varying course. The result is that perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory, and very often mischievous in its practical operation.' Page 546.

"Little aid is supplied by a consideration of our own colonial history and the early history of our separate national existence. The colonies followed closely the practice of the mother country. Even the publication of general laws was forbidden by the magistrates, who yielded only after long and bitter struggles. Royal governors were instructed to prohibit printing, books were burned as offenders against the public welfare, and the school histories all tell about Governor Berkley's boast that free schools and printing presses were not allowed in Virginia. The proceedings of the convention which framed the Constitution of the United States were conducted in secret. The provision forbidding Congress to pass any law abridging the freedom of speech or of the press came into the Constitution by way of an amendment. The debates of the Senate did not become open to the public until 1793, and the incident of the ill-starred sedition law³ in our constitutional history shows how far ideas relating to the protection of personal character and governmental institutions were then unreconciled in legal theory with freedom of thought and expression upon public questions.

"At the time the Constitution of this state [Kansas] was adopted, some progress had been made and some clarification had taken place. But statutory improvement had been halting and inefficient, judicial decisions had often been narrow, illiberal, and confusing, and the main principles of the law of libel remained substantially the same as they were when Blackstone wrote. The result is that 'liberty of the press' is still an undefined term, and, like some other familiar phrases of constitutional law, must remain undefined. Certain boundaries are fairly discernible, within which the liberty must be displayed, but precise rules cannot be formulated in advance to govern its exercise on particular occasions. In the decision of controversies the character, the organization, the needs, and the will of society at the present time must be given due consideration. The press as we know it to-day is almost as modern as the

³ The Federal Sedition Act of 1798, which expired by its own limitation in 1801. For the provisions of this act, see *infra*, p. 282.

telephone and the phonograph. The functions which it performs at the present stage of our social development, if not substantially different in kind from what they have been, are magnified many fold, and the opportunities for its influence are multiplied many times. Judicial interpretation must take cognizance of these facts. As Mr. Chief Justice Cockburn said in deciding a famous libel suit:

“‘Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage: That its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generations to which it is immediately applied.’⁴

“The constitutional guaranty clearly means that the press shall be free from previous government license, and the decisions are quite uniform, but not unanimous, that it shall be free from court censorship through injunctions against publication. Early writers on constitutional law and early cases say that it means no more, but later commentators and later decisions maintain that it does mean more. Thus Judge Cooley has said:

“‘But while we concede that liberty of speech and of the press does not imply complete exemption from responsibility for everything a citizen may say or publish, and complete immunity to ruin the reputation or business of others so far as falsehood and detraction may be able to accomplish that end, it is nevertheless believed that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for

⁴ *Wason v. Walter*, L. R. 4 Q. B. 73, 92 (Eng. 1868).

harmless publications. * * * The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens. The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation or pecuniary interests of individuals.⁵

"This doctrine was recently authoritatively stated by the Supreme Court of North Carolina, as follows:

⁵ Cooley's Constitutional Limitations (7th Ed.) 603, 604. See, also, the following excerpts from opinions by Mr. Justice Holmes:

"In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as has been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." Holmes, J., in *Patterson v. Colorado*, 205 U. S. 454, 462, 27 Sup. Ct. 556, 558 (51 L. Ed. 879, 10 Ann. Cas. 689).

"It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*." Holmes, J., in *Schenck v. United States*, 249 U. S. 47, at page 51, 39 Sup. Ct. 247, at page 249 (63 L. Ed. 470).

Blackstone's definition of "freedom of speech." It consists "in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." Volume 4, p. 151. Quoted in 246 Fed. at page 27, 158 C. C. at page 253 (L. R. A. 1918C, 79), in *Masses Pub. Co. v. Patten*.

Paterson: "The liberty of the press means the liberty of publishing whatever any member of the public thinks fit on any subject, without any preliminary license or qualification whatsoever, and subject only to this restriction: That if he goes to an extreme in making blasphemous, immoral, seditious, or defamatory statements, then he may be punished afterwards by indictment, information, or by action for such excess." *Liberty of the Press, Speech, and Public Worship*, p. 38.

For a further lucid and scholarly discussion of the question of limitations upon the right to impose subsequent punishment, see "Freedom of Speech in War Times," 32 Harv. Law Rev. 932. See, also, on the same question, "Freedom of Speech and of the Press," 2 Minn. Law Rev. 239.

"In its broadest sense, freedom of the press includes, not only exemption from censorship, but security against laws enacted by the legislative department of the government, or measures resorted to by either of the other branches, for the purpose of stifling just criticism or muzzling public opinion.'⁶

"Such also is the opinion of the Supreme Court of Texas.

"Whatever more than freedom from previous license the constitutional guaranty may include, it is clear that it does not grant immunity for the publication of articles which imperil the public peace, by advocating the murder of governmental officers and the destruction of organized society. Constitutional government may at least protect its own life, and Johann Most was properly convicted under a statute designed to secure the public peace, because of an article appearing in his newspaper, the *Freiheit*, instigating revolution and murder, suggesting the persons to be murdered through the positions occupied and the duties performed by them, advising all persons to discharge their duty to the human race by murdering those who enforce law, denouncing those who would spare ministers of justice as guilty of a crime against humanity, and naming poison and dynamite as agencies to be employed in murder and destruction.⁷

"Constitutional government may also under its police power take reasonable steps to protect the morals of the people for whom and by whom it is instituted, and to this end may suppress the circulation of newspapers which * * * are devoted largely to the publication of scandals, lechery, assignations, intrigues of men and women, and other immoral conduct.⁸ Likewise newspapers may be suppressed which are made up principally of criminal news, po-

⁶ *Cowan v. Fairbrother*, 118 N. C. 406, 418, 24 S. E. 212, 32 L. R. A. 829, 54 Am. St. Rep. 733.

⁷ *People v. Most*, 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509, *infra*, p. 314. See, also *Holmes, J.*, in *Frohwerk v. U. S.*, 249 U. S. 204, 206, 39 Sup. Ct. 249 (63 L. Ed. 561): "We venture to believe that neither Hamilton, nor Madison, nor any other competent person, then or later, ever supposed that to make criminal the counseling of murder, within the jurisdiction of Congress, would be an unconstitutional interference with free speech"

⁸ *In re Banks*, Petitioner, 56 Kan. 242, 42 Pac. 693, *infra*, p. 354;

lice reports, and pictures and stories of bloodshed, lust and crime.⁹ Newspapers like those just described display the licentiousness, and not the liberty, of the press. Here, as elsewhere in our political system, just rules and regulations are not badges of oppression, but are the necessary conditions of true liberty, and the constitutional guaranty under discussion is not opposed to penal and remedial laws upon the subject of libel and the regulation of procedure in the conduct of libel cases.” *

4. Seditious Utterances.—Because of its somewhat indefinite and much-mooted character, the subject of sedition calls for a more extended exposition than the brief statement given above.

The subject of sedition presents the situations around which the battles for the freedom of the press and of speech have mainly raged. The reason for the gathering of the forces at this point will plainly appear, when it is noted that sedition is the name applied to certain efforts to subvert or bring into contempt existing government, its officers, and its laws. The law of sedition had its origin in the natural disposition of a government to maintain itself. The severity of the law has naturally varied with the character of the ruler and the conception of government. Under a régime where the right of the people to share in the government is not admitted, one would expect to find a disposition to render criminal even the mildest criticisms of the ruler, or of the government in any of its departments. Holt, C. J., in 1704, runs true to this form when he says: “If persons should not be called to account for possessing the people with an ill opinion of the government, no government can subsist; for it is very necessary for all government that the people should have a good opinion of it.” Such doctrine left no room for freedom of political speech.

As the whole movement for human liberty gained ground,

State v. Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627; Strohm v. People, 160 Ill. 582, 43 N. E. 622.

⁹ State v. McKee, 73 Conn. 18, 46 Atl. 409, 48 L. R. A. 542, 84 Am. St. Rep. 124, *infra*, p. 345.

*Coleman v. MacLennan, 78 Kan. 711, 715 et seq., 98 Pac. 281, 20 L. R. A. (N. S.) 492.

and government became more representative, the laws of sedition became less drastic and freedom of utterance grew apace. To-day in England sedition is limited to those utterances, concerning the king or individual members of the government, which would be libels if printed and published of any other public character, and to those publications "the direct tendency of which is to bring the Constitution of the realm into hatred and contempt, and to induce the people to disobey the laws and to defy legally constituted authority"—in a word, to malicious endeavors to promote public disorder, and to induce rebellion or civil war.¹⁰

In the United States, conceptions of the right of the government to be free from criticism have been from the outset and still are unsettled. The recent war has brought the subject into bold relief. That one of the objects of the Revolutionary War was to rid us of the narrow English common law of liberty of speech and of the press can hardly be doubted. Star chamber prosecutions for criticisms of the English government and laws must have been vividly present to the minds of those who drafted and adopted the First Amendment to the Constitution of the United States.

Moreover, our new theory of government would normally be expected to give rise to a definition of sedition far different from that in vogue in England at that time. Naturally enough, where the ruler was conceived of as the superior of the people, the right of the people to criticise him

¹⁰ Odgers, *Slander & Libel* (4th Ed.) p. 522. See, also, Paterson, *Liberty of the Press, Speech, and Public Worship*, pp. 81 and 84.

Paterson, p. 81: "From what has preceded, it will be obvious that sedition is more than a vague, general discontent with the mode of government existing. The essence of seditious libel may be said to be its immediate tendency to stir up general discontent to the pitch of illegal courses; that is to say to induce people to resort to illegal methods, other than those provided by the Constitution, in order to repress the evils which press upon their minds. * * *

"A seditious libel, therefore, in its shortest definition, consists in 'any words which tend to incite people immediately to take other than legal courses to alter what the government has in charge.'"

Paterson, p. 84: "Words which were formerly deemed seditious would now be deemed mere expressions of abstract opinion as to the best forms of government, and such are now tolerated, both within and without the walls of Parliament, as the inevitable result of freedom of thought."

must needs receive small recognition; whereas, a ruler who was at once the servant of the people might well be subject to unlimited criticism by them. It is somewhat surprising, therefore, to find the Congress of the United States, almost before the ink of the First Amendment was dry, passing the famous Sedition Act of 1798. Section 1 of that law made it a crime, punishable by a fine not exceeding five thousand dollars, and by imprisonment for a term not less than six months or exceeding five years, to conspire to oppose any measure of the government, or impede the operation of any law of the United States, or to prevent any government official from executing his trust, or to advise any insurrection, riot, or unlawful assembly to accomplish such purpose. Section 2 provided a penalty of a fine not to exceed two thousand dollars, and imprisonment not to exceed two years, for any person who should write, utter, or publish, or cause to be written, uttered, or published, any false, scandalous, or malicious writing against the government of the United States, or either house of Congress, or the President, with intent to defame or bring them into contempt or disrepute, or excite against them that hatred of the good people of the United States, or to stir up sedition, or to excite any unlawful combinations for opposing or resisting any law or any act of the President done in pursuance of law, or to resist, oppose, or defeat any such law or act.

Four prosecutions and convictions were had under this act, but the offenders were pardoned by Jefferson, and the cases did not come before the Supreme Court. The constitutionality of the law has never been passed upon by the Supreme Court. "The act provoked great resentment throughout the country, and when it expired by its own limitation in 1801 it was not renewed."¹¹ Its constitutionality has been questioned.¹²

¹¹ Rogers, J., in *Masses Pub. Co. v. Patten*, 246 Fed. 24, 29, 158 C. C. A. 250, 255 (L. R. A. 1918C, 79).

¹² Schofield, *Freedom of the Press in the United States*, 9 Soc. Publications, 87. In a letter by Jefferson to Mrs. John Adams, July, 1804, he had the following to say concerning the Sedition Act (*Jeffersonian Cyclopaedia*, p. 31):

"I discharged every person under punishment or prosecution under the sedition law, because I considered and now consider that

A few years later an act was passed by Congress making it a serious crime to incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or to give aid or comfort to such uprisings. The offense here defined is for inciting, not merely attempting to incite. The validity of such a law is beyond question.

During the long years intervening between the few prosecutions under the Sedition Act of 1798 and our entrance into the Great War, the United States government viewed with indifference the verbal attacks of hot-headed politicians, a vituperative press, and the rabid anarchistic soap-box orator and pamphleteer. Then followed, as one of the first acts to aid in the successful prosecution of the war and the protection of the country from the enemy at home as well as abroad, the so-called Espionage Act of June, 1917, and the noteworthy Seditious Libel Amendment thereto in May, 1918. Both the original act and the act as amended are expressly limited to the duration of a state of war, but the agitation for peace legislation embodying some of the features of the war acts makes them of more than historical interest and value.

The original act in section 3 declared it an offense, entailing a maximum fine of \$10,000, or a maximum imprisonment of twenty years, or both, to (1) willfully make a false statement with intent to interfere with the military or naval forces of the United States or to promote the success of its enemies; or (2) to willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States; or (3) to willfully obstruct the recruiting or enlistment service of the nation.

law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image, and that it was as much my duty to arrest its execution in every stage as it would have been to have rescued from the fiery furnace those who should have been cast into it for refusing to worship the image. It was accordingly done in every instance, without asking what the offenders had done, or against whom they had offended, but whether the pains they were suffering were inflicted under the pretended sedition law."

In a later letter to Gideon Granger, Jefferson calls attention to the fact that the prosecutions were chiefly for charges against himself.

The amendment, enacted in May, 1918, added clauses embodying even more drastic provisions than those of the Sedition Act of 1789. The amendment brings under the penalties of the act:

(1) Those who write or utter any disloyal, profane, scurrilous, or abusive language about (a) the form of government, or (b) the Constitution, or (c) the flag, or (d) the military or naval forces, or, (e) the uniform of the army or navy, of the United States;

(2) Those who write or utter any language intended to bring (a) the form of government, or (b) the Constitution, or (c) the military or naval forces, or (d) the uniform of the army or navy, of the United States into contempt, scorn, contumely, or disrepute;

(3) Those who utter, write, or publish any language intended to incite, provoke, or encourage resistance to the United States or promote the cause of its enemies;

(4) Those who display the flag of any foreign enemy;

(5) Those who urge, incite, or advocate any curtailment of production in this country of any things or products essential to the prosecution of the war, with intent thereby to hinder the United States in the prosecution of the war;

(6) Those who advocate, teach, defend, or suggest the doing of any of the acts enumerated in this section;

(7) Those who by word or act favor the cause of any country with which the United States is at war;

(8) Those who by word or act oppose the cause of the United States in the war.

The Supreme Court of the United States has held all of the provisions of the Espionage Act of 1917, and paragraphs 3 and 5 definitely, and 1 and 2 apparently, of the Sedition Act of 1918, constitutional.¹³ Paragraphs 1, 2, 7,

¹³ *Schenck v. United States* and *Baer v. United States*, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; *Frohwerk v. United States*, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561; *Debs v. United States*, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566; *Abrams v. United States*, 250 U. S. 616, 40 Sup. Ct. 17, 63 L. Ed. 1173. See Brandeis, J., in *Gilbert v. Minnesota*, 254 U. S. 325, at page 336, 41 Sup. Ct. 125, 129, 65 L. Ed. 146, at page 150:

"Congress, which has power to raise an army and naval forces by conscription when public safety demands, may, to avert a clear and present danger, prohibit interference by persuasion with the process

and 8 of the Sedition Act on their face constitute the severest restriction upon freedom of speech and of the press ever enacted in the United States. But in construing them one of the federal judges at least has attempted to ameliorate their apparent harshness, and thus in a measure to temper the wind to the shorn lamb. Judge Bean, in *U. S. v. Marie Equi*, has the following to say with reference to whether the act rendered all criticism of the government's conduct of the war criminal:

"The law does not forbid differences of opinion or reasonable discussion as to the causes which induced Congress to declare war, or as to the results to be attained by the war, or at the end of the war, nor the time and conditions under which the war should be brought to an end, nor any reasonable and tempered discussions and differences of opinions upon any or all of the measures or policies adopted in carrying on the war. The law is limited to making it a crime to oppose by word or act the military measures taken by the United States or under lawful authority by the officers of the United States for the purpose of prosecuting the war to a successful end."¹⁴

The application of these acts to the several hundred cases that have been prosecuted under them has given rise to certain difficult and far-reaching questions of construction, and the results illustrate the dangers inherent in this type of legislation. One of the important questions for the court to decide has been whether, under the Espionage Act, guilt was to be limited to those cases where there was a direct

of either compulsory or voluntary enlistment. As an incident of its power to declare war it may, when the public safety demands, require from every citizen full support, and may, to avert a clear and present danger prohibit interference by persuasion with the giving of such support."

"Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise in governmental action, and in suppression lies ordinarily the greatest peril. There are times when those charged with the responsibility of government, faced with clear and present danger, may conclude that suppression of divergent opinion is imperative, because the emergency does not permit reliance upon the slower conquest of error by truth. And in such emergencies the power to suppress exists."

¹⁴ Department of Justice, Pamphlet B, 172, also quoted in 17 Mich. Law Rev. 655.

appeal to persons to violate the law (for example, to engage in acts of insubordination, disloyalty, mutiny, or refusal of duty or to refrain from enlistment), or was to include as well the use of language the reasonable tendency of which was to produce such illegal conduct, and again on whether the remote or immediate tendency of the language to produce the evils aimed at was to be taken as a test. On these questions the courts have not been at one. Judge Learned Hand, for example, took the following position in *Masses Pub. Co. v. Patten*:¹⁵

"If one stops short of urging upon others that it is their duty or to their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to produce a seditious temper is illegal. I am confident that by such language Congress had no such revolutionary purpose in view."

And again, further on in the same case, he says:

"Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them into execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government."

In contrast with the test laid down by Judge Hand, Judge Rogers, in discussing the same case in the Court of Appeals, said:¹⁶

"If the natural and reasonable effect of what is said is to encourage resistance to the law, and the words are used in the endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned."

¹⁵ 244 Fed. 535, 540.

¹⁶ *Masses Pub. Co. v. Patten*, 246 Fed. 24, 38, 158 O. C. A. 250, 264 (L. R. A. 1918C, 79).

Considering the rules in the light of the facts, one of the important of which was the printing in the Masses of a eulogy on Emma Goldman and Alexander Berkman, who were then serving prison terms for their criminal activities, Judge Rogers, said further:

"Judge Hough declared: 'It is at least arguable whether there can be any more direct incitement to action than to hold up to admiration those who do act. *Oratio obliqua* has always been preferred by rhetoricians to *oratio recta*; the Beatitudes have for some centuries been considered highly hortatory, though they do not contain the injunction: 'Go thou and do likewise.' With this statement we must fully agree. Moreover, it is not necessary that an incitement to crime must be direct. At common law the 'counseling' which constituted one an accessory before the fact might be indirect. * * * And in *Regina v. Sharpe*, 3 Cox's C. C. 288, it is laid down that: 'He who inflames the people's minds and induces them to violent means to accomplish illegal objects is himself a rioter, though he take no part in the riot.'"

Justice Holmes, in the Debs Case, makes the "probable effect" of the language the test. And later, in sustaining the verdict of guilty in *Frohwerk v. United States*,¹⁷ in the same vein he remarks:

"But we must take the case on the record as it is, and in that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breach would be enough to kindle a flame and that the fact was known to and relied upon by those who sent the paper out."

The question, in its most important aspect, resolves itself into one of the *tendency* of the language, and that in turn is a question of greater or less. Or, to put it differently: Is it the remote or immediate tendency of the words that is to determine the defendant's guilt? There are obvious difficulties with taking the remote tendency of the language as the test. To do that would render precarious any criti-

¹⁷ 249 U. S. 204, 209, 39 Sup. Ct. 249, 251 (63 L. Ed. 561).

cism of existing law. But that seems to be the test that many of the federal courts have applied during the war. Justice Holmes, speaking to this point, made it explicit, however, in *Schenck v. United States*,¹⁸ that "the question in every case is whether the words are used in such circumstances and are of such a nature as to create a *clear and present* danger that they will bring about the substantive evils that Congress has a right to prevent. It is a ques-

¹⁸ 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470. See, also *Schaefer v. United States*, 251 U. S. 466, 40 Sup. Ct. 259, 64 L. Ed. 360.

In this case four persons, including Schaefer, were indicted for publishing in papers printed in the German language in Philadelphia articles and news dispatches alleged to be false and intended to promote the success of the enemies of the United States, to cause mutiny, etc., and to obstruct recruiting.

Judgment of conviction was affirmed as to two of the defendants, and reversed as to the other two, on the ground that they were not proved to have been connected with the publication. Justices Brandeis, Clark, and Holmes dissented as to the affirmation of any of the convictions.

Justice Brandeis argues that the article, "which is not unlike many reprints from the press of Germany to which our patriotic societies gave circulation in order to arouse the American fighting spirit," could not rationally be held to tend "even remotely or indirectly to obstruct recruiting." Justice Brandeis says further: "But as this court has declared, and as Prof. Chafee has shown in his 'Freedom of Speech in War Time,' 32 Harv. Law Rev. 932, 963, the test to be applied—as in the case of criminal attempts and incitements—is not the remote or possible effect. There must be the clear and present danger. Certainly men judging in calmness and with this test presented to them could not reasonably have said that this coarse and heavy humor immediately threatened the success of recruiting." Justice Brandeis says further: "The extent to which Congress may under the Constitution interfere with free speech was in *Schenck v. U. S.*, 249 U. S. 47, 52; 63 L. Ed. 470, 473, declared by a unanimous court to be this: 'The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.' This is a rule of reason. Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities, and from abuse by irresponsible, fanatical minorities. Like many other rules for human conduct, it can be applied correctly only by the exercise of good judgment; and to the exercise of good judgment, calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty. The question whether, in a particular instance, the words spoken or written fall within the permissible curtailment of free speech, is, under the rule enunciated by this court, one of degree. And because it is a question of degree the field in which the jury may exercise its judgment is, necessarily, a wide one. But its field is not unlimited."

tion of proximity and degree." In other words, the danger must be immediate to justify the repression of mere speech.

Various types of legislation are now being presented for national and state action to curb the activities of anarchists and other radical elements. Most of the proposals do not contain the more drastic provisions of the Federal Sedition Act, but are limited strictly to the advocacy of and attempts to nullify state or national laws by violence. Thus restricted, the constitutionality of the laws would seem to be assured. Moreover, the purpose of such legislation must readily commend itself to every law-abiding citizen. Under a form of government which makes ample provision for an orderly change, even of the fundamental law, there can be no place for forceful aggression or resistance. And since, as Judge Learned Hand has well said, "words are not only the keys of persuasion, but the trigger of action," language which is intended to and has a direct and imminently dangerous tendency to produce such acts of violence must come under condemnation similar to that of the acts themselves.

But, in spite of its obvious general merits, even such legislation is not entirely free from danger. Unless it is confined in its application to those cases where the criminal intent is clear and the likelihood of causing lawless acts is imminent, it may, at least in times of public stress, become a weapon of intolerance toward that free expression of opinion which is the final source of righteous and progressive government in a democratic state. The line between immediate and remote tendency to produce violence must be fully recognized and clearly drawn. Some one may suggest by way of answer that there is a sufficient safeguard to mere agitation for change and criticism in the fact that an intent on the part of the defendant to produce illegal action must be proved as an ingredient of the crime. But this is obviously not entirely adequate when we recall the rule of law, so often stated, that a person is presumed to intend the natural consequences of his acts, and that, when public feeling is running high, it is easy to suspect an unpopular minority of vicious purposes. In the last analysis, there-

fore, the general agitation for legislation aimed at anarchy and radicalism presents a large question of policy.¹⁹ Only sane judgment, based upon a due appreciation of the inestimable value of a free press and free speech in a free country, and a full understanding of social conditions and social psychology can return a correct answer. In our solicitude for the preservation of our inherited institutions, it is not to be forgotten that freedom of speech and of the press are among them, and that the far-sighted purpose of the founders of our government was to preserve to the individual the largest possible measure of freedom of thought, utterance, and action consistent with the welfare of the whole people. Judge Holmes' words in the dissenting opinion in the *Abrams Case* contain a counsel of wisdom:

"* * * When men have realized that time has upset many fighting faiths, they may come to believe, even more than they believe the very foundations of their own conduct, that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their

¹⁹ "Whatever be decided as to constitutionality, the Espionage Act prosecutions break with a great tradition in English and American law. Only once before has the United States tried to punish political crimes, and the Sedition Act of 1798, with its maximum of two years' imprisonment, wrecked the Federalist party. The Mexican War produced the *Bigelow Papers*, and every stanza in the opening poem would have violated a separate clause of the Espionage Act of 1918, if the slaveholders had drafted such a statute. We fought the Civil War with the enemy at our gates and powerful secret societies in our midst without an Espionage Act. When the disloyal press was curbed by Burnside and his subordinates, they received sharp telegrams of revocation from Lincoln. The irritation produced by such acts was, in his opinion, likely to do more harm than the publication would do." Chafee, *Freedom of Speech*, p. 116.

Compare James Parker Hall, *Free Speech in War Time*, 21 *Columbia Law Rev.* 526:

"[During the Civil War] without the sanction of legislation, the federal government arrested by the thousand men whom it knew or suspected to be dangerous or disaffected, and confined them without charges and without trial in military prisons as long as it saw fit—and public opinion generally acquiesced, in this as a fairly necessary measure of war-time precaution. The number of such executive arrests has been variously estimated up as high as 38,000. The War Department records, confessedly very incomplete, show over 13,000. Our recent record of about 2,000 prosecutions under the Espionage Acts, with perhaps half as many convictions, compares very favorably with this. * * *

wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so immminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 (Act July 14, 1789, c. 73, 1 Stat. 596), by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.'"

The problem is not solved when it is decided that repression is lawful. It may not be expedient. The anarchist, declaiming from a box on the public street, may be much less of a menace than he would be if driven under cover. Talking may be the safety valve that will prevent social explosion.

5. Miscellaneous Statutory Regulations of the Press.—Taking the states by and large, including the federal government, there are a substantial number of statutes other than those dealing with libel and sedition which place various restrictions upon the press.

They have been classified in this treatise under the following headings: News of Crime or Lust; Obscene Writings; Misrepresenting Circulation to Secure Advertisements; Labeling Advertisements as Such; False Advertisements; Advertising Lotteries; Advertising Abortifacient Drugs or Instruments; Advertising Cures for Venereal Diseases; Advertising Debts for Sale, with Names

of Debtors; Advertising Intoxicating Liquors in Dry Territory; Advertising to Procure Divorces; Threats to Publish Libel; Statement of Ownership; Privileges of the Mail.

6. News of Crime or Lust.—Publications “devoted to, or principally made up of, criminal news, police reports, or pictures and stories of deeds of bloodshed, lust, or crime,” are declared illegal in approximately a dozen states.²⁰ The following reasoning supports this legislation:

“The notion that the broad guaranty of the common right to free speech and free thought, contained in our Constitution, is intended to erect a bulwark or supply a place of refuge in behalf of the violators of laws enacted for the protection of society from the contagions of moral diseases, belittles the conception of constitutional safeguards and implies ignorance of the essentials of liberty.”²¹

(a) A publication is “devoted to” such matters, if they are conspicuously and with especial prominence set forth and displayed therein.

(b) “Principally made up of” means that “the matters in question shall appear in the paper in such quantity, prominence, and arrangement as to form or become a leading feature or characteristic of such paper.” They need not be the sole content of the publication, nor cover any definite percentage of it. They may be interspersed with legitimate news. To come within the statute it is only necessary that the resulting effect be that of a “massed immorality.”

“The gist of the offense consists in disseminating by means of the newspaper, which finds its way into families, reaching the young as well as the mature, a selection of immoralities so treated as to excite attention and interest sufficient to command circulation for a paper devoted mainly to the collection of such matters.”²²

(c) The motive of the publisher is not material. Though his mission be honestly reformatory, it will not protect him.

²⁰ *Infra*, p. 347.

²¹ *State v. McKee infra*, p. 345.

²² *State v. McKee, infra*, p. 345.

(d) A few states limit the offense to the selling or giving of such publications to minors.

(e) The Minnesota statute, quoted and discussed in *State v. Pioneer Press Co.*,²³ prohibiting the publication of details of executions, is in the same category.

7. Obscene Writings.—Common and statute law alike render the publication of obscene and indecent writings criminal. State statutes generally condemn them and an act of Congress renders them nonmailable. The state of Washington prohibits any detailed account of the commission of a sexual crime even though it be contained in the report of the trial thereof.

A learned writer suggests that the test of the immorality of the writing is whether it "has a tendency to shock the moral sense of the average, normal head of a family." The same writer suggests that, if the existing test prevents the publication of writings of educational value on sex hygiene, commercialized vice, and the like, a remedy is open through the Legislature, for the Constitution only prevents restrictions upon, and not enlargements of, the right to publish.²⁴

8. Misrepresenting Circulation to Secure Advertisements.—In a few states the Legislatures have made it a crime for a newspaper proprietor or publisher with knowledge of the falsity of the statement to misrepresent the circulation of the paper for the purpose of securing advertisements or other patronage. A deceitful intent on the part of the paper is essential to its liability. If the misstatement is innocently made, no crime is committed.²⁵

9. Labeling Advertisements as Such.—With a view to purifying politics, a number of states have made it unlawful for the publisher of a newspaper to insert, either in its advertising or reading columns, any paid matter which is intended to aid or defeat any candidate or political party or measure before the people, unless it is stated therein

²³ *Infra*, p. 307.

²⁴ Schofield, 9 Soc. Publications, 82.

²⁵ *Infra*, p. 356.

that it is a paid advertisement. Some of the statutes also require that the name, or name and address, of the author shall be given. It is also usually provided in such legislation that it shall be unlawful to pay the owner, editor, publisher, or agent of any newspaper to advocate or oppose editorially the nomination or election of any candidate for office, or for such owner, editor, publisher, or agent to accept such payment. An act of Congress provides that *all* editorial or other reading matter, for the publication of which the paper has been paid, shall be marked "advertisement," not limiting the regulation to matter having a political aspect.²⁶

10. False Advertisements.—With a view to protecting the public from fraudulent selling schemes, it is provided in three or four states that it shall be unlawful to insert and disseminate, through a newspaper or otherwise, any advertisement regarding merchandise, securities, service, or anything else offered to the public for sale which contains any false statement of fact, with the express proviso, however, that the owner, publisher, or agent of the newspaper shall not be liable if the advertisement was published in good faith.²⁷

11. Advertising Lotteries.—Both state and federal statutes make it a criminal offense knowingly to print or distribute any advertisement of any lottery ticket or scheme. The federal statute has reference only to the distribution of such advertisements in the mails.²⁸

12. Advertising Abortifacient Drugs or Instruments.—Many states provide that it shall be unlawful to publish or cause to be published any advertisement or statement conveying any notice or hint as to where any drug, instrument, or advice may be obtained for the purpose of causing a woman to miscarry. Heavy penalties are imposed for such offenses.²⁹

13. Advertising Cures for Venereal Diseases.—A few states make a proprietor, manager, or editor of a publication

²⁶ *Infra*, p. 358.

²⁷ *Infra*, p. 358.

²⁸ *Infra*, p. 359.

²⁹ *Infra*, p. 366.

criminally responsible for permitting the publication of any card or notice advertising any treatment or cure for any venereal disease, or for weakness of sexual organs caused by sexual vice or abuse.³⁰

14. Advertising Debts for Sale, with Names of Debtors.—So long as we have courts through which debtors may be compelled to pay their debts, it is obviously improper for the creditor to resort to any form of blackmail. There is justice, therefore, in the Maine statute, which renders it unlawful to advertise debts for sale accompanied by the names of the debtors.³¹

15. Advertising Intoxicating Liquors in Dry Territory.—Some of the prohibition legislation has included a clause making it unlawful for a newspaper in dry territory to carry any advertisement or notice for the sale of intoxicating liquors.³²

16. Advertising to Procure Divorces.—There are a few state statutes which make it unlawful for a paper to publish any advertisement or notice which offers to secure any divorce or to engage or act as an attorney in any suit for alimony or divorce.³³

17. Threats to Publish Libel.—A threat to publish a libel in order to extort money or other valuable consideration is made a crime by statute in several states, and might well be held criminal in others on common law principles.³⁴

18. Statement of Ownership.—(a) The Federal Statute.—In order to enjoy second-class mail privileges, it is made necessary by a federal statute for the editor, publisher, business manager, or owner of a newspaper, magazine, periodical, or other publication (except religious, fraternal, temperance, and scientific or other similar publications):

(1) To file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the 1st day of April and the 1st day of October of each year, sworn statements setting forth (a) the

³⁰ *Infra*, p. 366.

³¹ *Infra*, p. 367.

³² *Infra*, p. 367.

³³ *Infra*, p. 368.

³⁴ *Infra*, p. 368.

names and post office addresses of the managing editor, publisher, business managers, and owners; (b) if the publication be owned by a corporation, the names and post office addresses of all stockholders owning one per centum or more of the capital stock; (c) the names of all known bondholders, mortgagees, or other security holders, owning one per centum or more of the total amount of such bonds, mortgages, or other securities; and (d) in the case of daily newspapers, a statement of the average number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months.

(2) To publish a copy of such sworn statement in the second issue of such newspaper, magazine, or other publication printed next after the filing of the statement.³⁵

(b) **State Statutes.**—A few state statutes require every newspaper, magazine or other periodical published in the state to print in a prominent place, e. g., upon the outer cover, or at the head of the editorial page, the full name and address of the owner of the publication, if any individual, or, if the owner be a corporation, the name of the corporation, and the address of the principal place of business, together with the names and addresses of the president, secretary, and treasurer thereof, or, if the owner be a partnership, limited partnership, or unincorporated joint-stock company, the full names and addresses of the partners or of the officers and managers of the organization.³⁶

19. Second-Class Mail Privileges.—The provisions of the federal statute hereinafter set out state with sufficient clearness and conciseness the regulations concerning second-class mail privileges—the conditions upon which entry may be had and the postage charged.³⁷

³⁵ *Infra*, p. 369.

³⁶ *Infra*, p. 368.

³⁷ *Infra*, p. 370.

SECTION 1.—THE CONSTITUTIONAL PROVISIONS IN GENERAL

STATE ex inf. CROW, Atty. Gen., v. SHEPHERD.

(Supreme Court of Missouri, 1903. 177 Mo. 205, 244-260, 76 S. W. 79, 91-96, 99 Am. St. Rep. 624.)

MARSHALL, J.³⁸ * * * Liberty of the Press. The defendant invokes section 14 of article 2 of the Constitution [of Missouri], which is as follows: "That no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact." It will be observed that the liberty of the press is not mentioned at all. The freedom of speech is guaranteed to "every person." Of course, the press will be included in the general designation of "every person." But the press has no greater liberty in this regard than any citizen. Newspapers and citizens have the same right to tell the truth about anybody or any institution. Neither has any right to scandalize any one or any institution. *Barnes v. Campbell*, 59 N. H. 128, 47 Am. Rep. 183; *Pratt v. Pioneer Press Co.*, 30 Minn. 41, 14 N. W. 62; *Mallory v. Pioneer Press Co.*, 34 Minn. 521, 26 N. W. 904; *Bronson v. Bruce*, 59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307; *McAllister v. Detroit Free Press*, 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318; *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715.

The First Amendment to the Constitution of the United States specifically mentions the liberty of the press. It is as follows: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." It will be noted, however, that, though the press is here specifically referred to, it is coupled with the freedom of speech of the citizens,

³⁸ The defendant in this case was charged with contempt of court, based upon an editorial in the *Standard-Herald* in which he accused the Supreme Court of Missouri of receiving bribes and of corruption in a pending case. Only so much of the opinion is here given as relates to the defendant's contention that to punish him would be a violation of his constitutional right of freedom of speech.

and no special freedom is conferred upon the one that is not likewise conferred upon the other. It is most important, therefore, to clearly understand what is meant by "freedom of speech," or, as it is usually termed when speaking of newspapers, the "liberty of the press."

In 18 Am. & Eng. Enc. Law (2d Ed.) p. 1125, "liberty of the press" is thus defined: "The liberty of the press consists in the right to publish with impunity the truth, with good motives, and for justifiable ends, whether it respects governments or individuals; the right freely to publish whatever the citizen may please, and to be protected against any responsibility for so doing, except in so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals."

Judge Cooley, in his invaluable work on Constitutional Limitations (6th Ed.) p. 518, says: "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or, to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted."

Paterson on the Liberty of the Press, etc., p. 5, clearly explains the right as follows: "The restraints which confine the natural liberty of speech will be found ranged under four great heads of blasphemy, immorality, sedition, and defamation. There are bounds to be set to the expression of thoughts and opinions, and these must rest on the fundamental principles on which all societies are founded. It is assumed that there is a God in whom all citizens in their gravest moods are so interested that it becomes offensive to all the rest if any one speaks of Him publicly in a scurrilous and contemptuous tone, such as would provoke a breach of the peace. Hence the first limit to free speech is blasphemy. There are also rules of morality, which are so universal, and

so underlie the conscience of every individual, that speeches and writings which treat these rules with public contempt, and sap and mine the simple faith in all that is good, noble, and worthy, are also deemed a species of constructive breach of the peace too irritating to be allowed. Hence another limit to free speech and writing is immorality. Again, there are rules of good conduct, founded on the general duty of all citizens to support the government under which they live, and, if possible, to insure due respect and fair treatment to its leading administrators. Hence gross contempt of all laws, and violent menaces of revolt against such guardians, must not be allowed, for these necessarily discompose every citizen, and perplex him with fear of change or fear of public disaster and anarchy. And when this last head is still further examined, it will appear that the great factors of government, consisting of the Sovereign, the Parliament, the ministers of state, the courts of justice, must all be recognized as holding functions founded on sound principles and to be defended and treated with an established and well-nigh unalterable respect. Each of these great institutions has peculiar virtues and peculiar weaknesses, but whether at any one time the virtue or the weakness predominates, there must be a certain standard of decorum reserved for all. Each guarded remonstrance, each fiery invective, each burst of indignation must rest on some basis of respect and deference towards the depository, for the time being, of every great constitutional function. Hence another limit of free speech and writing is sedition. And yet within that limit there is ample room and verge enough for the freest use of the tongue and pen in passing strictures on the judgment and conduct of every constituted authority. While the restrictions already mentioned, which are founded on blasphemy, immorality, and sedition, show the boundaries of free speech and thought as affecting the public generally, there is a fourth limit on the other side as affecting individuals, known under the head of 'Libel,' or the invasion of the reputation of private persons. This last limit involves the necessity of at once tracing the origin of that tendency of the individual to acquire such reputation and the value it possesses in his eyes, for it is here that the exercise of one natural right clashes directly with the exercise of the other, and both are equally natural and equally inevitable."

No better or clearer exposition of this subject has ever been written than what is said by McKean, C. J., of the Supreme Court of Pennsylvania, in *Respublica v. Oswald*, 1 Dall. 319, 1 L. Ed. 155. He said: "Assertions and imputations of this kind are certainly calculated to defeat and discredit the ad-

ministration of justice. * * * And here I must be allowed to observe that libeling is a great crime, whatever sentiments may be entertained by those who live by it. With respect to the heart of the libeler, it is more dark and base than that of the assassin, or than he who commits a midnight arson. It is true that I may never discover the wretch who has burned my house or set fire to my barn; but these losses are easily repaired, and bring with them no portion of ignominy or reproach. But the attacks of the libeler admit not of this consolation. The injuries which are done to the character and reputation seldom can be cured, and the most innocent man may in a moment be deprived of his good name, upon which, perhaps, he depends for all the prosperity and all the happiness of his life. To what tribunal can he then resort? How shall he be tried, and by whom shall he be acquitted? It is in vain to object that those who know him will disregard the slander, since the wide circulation of the public prints must render it impracticable to apply the antidote as far as the poison has been extended. Nor can it be fairly said that the same opportunity is given to vindicate which has been employed to defame him, for many will read the charge who will never see the answer; and, while the object of accusation is publicly pointed at, the malicious and malignant author rests in the dishonorable security of an anonymous signature. Where much has been said something will be believed; and it is one of the many artifices of the libeler to give to his charges an aspect of general support by changing and multiplying the style and name of his performances. But shall such things be transacted with impunity in a free country, and among an enlightened people? Let every honest man make this appeal to his heart and understanding, and the answer must be No! What, then, is the meaning of the Bill of Rights and the Constitution of Pennsylvania when they declare 'that the freedom of the press shall not be restrained,' and 'that the printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature, or any part of the government'? However ingenuity may torture the expressions, there can be little doubt of the just sense of these sections. They give to every citizen a right of investigating the conduct of those who are intrusted with the public business, and they effectually preclude any attempt to fetter the press by a licenser. The same principles were settled in England so far back as the reign of William III, and since that time we all know there has been the freest animadversion upon the conduct of the ministers of that nation. But is there anything in the language of the Constitution (much less in its spirit and intention) which authorizes one man to

impute crimes to another, for which the law has provided the mode of trial and the degree of punishment? Can it be presumed that the slanderous words, which, when spoken to a few individuals, would expose the speaker to punishment, become sacred, by the authority of the Constitution, when delivered to the public through the more permanent and diffusive medium of the press? Or will it be said that the constitutional right to examine the proceedings of government extends to warrant an anticipation of the acts of the Legislature or the judgment of the court; and not only to authorize a candid commentary upon what has been done, but to permit every endeavor to bias and intimidate with respect to matter still in suspense? The futility of any attempt to establish a construction of this sort must be obvious to every intelligent mind. The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity. If, then, the liberty of the press is regulated by any just principle, there can be little doubt that he who attempts to raise a prejudice against his antagonist in the minds of those that must ultimately determine the dispute between them, who, for that purpose, represents himself as a persecuted man, and asserts that his judges are influenced by passion and prejudice, willfully seeks to corrupt the source and to dishonor the administration of justice."

This wholesome and vigorous code of morals and rule of conduct is just as necessary to-day as it was when it was established in the early history of these United States. It accords with the sense of right of all good and patriotic people, and those who live by slander must expect to suffer the just punishments which the law imposes for their crimes.

Among the Ten Commandments given by God to Moses was, "Thou shalt not bear false witness against thy neighbor." Exodus, c. 20, verse 16. And when Christ went into Judæa, teaching the people, one came unto Him, and said, "Good Master, what good thing shall I do that I may have eternal life?" And He said unto him: "Why callest thou me good? There is none good but one. That is God. But if thou wilt enter into life, keep the commandments. He saith unto him, "Which?" Jesus said: "Thou shalt do no murder; thou shalt not commit adultery; thou shalt not steal; thou shalt not bear false witness; honour thy father and thy mother;

and thou shalt love thy neighbor as thyself." Matthew, c. 19, verses 16, 17, 18, and 19. These obligations are just as binding to-day as they have always been since they were thus promulgated. The laws of Moses also provided that, if a man slandered his wife, the elders of the city should chastise him, and should amerce him in an hundred shekels of silver, which should be given to the wife's father. Deut. c. 22, verses 13 to 19. "Coke says libeling and calumniation is an offense against the law of God." Paterson on Liberty of Press, etc., pp. 224, 225. Good people obey the laws, slander no one, and speak the truth. Others must do so, or be punished. Upon no other basis could good government rest, or the rights of the people be protected. A court that failed to enforce these laws would be so cowardly that it would be contemptible, and a disgrace.

It is material to investigate the history of the adoption of the constitutional guaranty of free speech, and to understand the evils it was intended to suppress. Cooley's Constitutional Lim. (6th Ed.) p. 513, says these constitutional provisions were not intended to confer any new rights, but simply to protect the citizen in those already possessed. It is then said: "At common law, however, it will be found that liberty of the press was neither well protected nor well defined. The art of printing, in the hands of private persons, has, until within a comparatively recent period, been regarded rather an instrument of mischief than as a power for good, to be fostered and encouraged. Like a vicious beast, it might be made useful if properly harnessed and restrained. The government assumed to itself the right to determine what might or might not be published; and censors were appointed, without whose permission it was criminal to publish a book or paper upon any subject." The learned author then points out that the censorship continued until the revolution of 1688, and it was a criminal offense to publish the proceedings of Parliament or of the courts, or even the current news of the day, without permission. He also shows that the same practice was followed in the American Colonies until the Revolution, and that even after the Revolution "the public bodies of the united nation did not at once invite publicity to their deliberations. The Constitutional Convention of 1787 sat with closed doors, and, although imperfect reports of the debates have since been published, the injunction of secrecy upon its members was never removed. The Senate for a time followed this example, and the first open debate was had in 1793."

The same author, at page 516, then adds: "It must be evident from these historical facts that liberty of the press, as now understood and enjoyed, is of very recent origin; and commentators seem to be agreed in the opinion that the term

itself means only that liberty of publication without the previous permission of the government, which was obtained by the abolition of the censorship. In a strict sense, Mr. Hallam says, it consists merely in exemption from a licenser. A similar view is expressed by De Lolme. 'Liberty of the press,' he says, 'consists in this: that neither courts of justice nor any other judges whatever are authorized to take notice of writings intended for the press, but are confined to those which are actually printed.' Blackstone also adopts the same opinion, and it has been followed by American commentators of standard authority [he refers to Story on Const. § 1889; 2 Kent, 17 et seq., and Rawle on Const. c. 10] as embodying correctly the idea incorporated in the constitutional law of the country by the provisions of the American Bills of Rights. It is conceded on all sides that the common-law rules that subject the libeler to responsibility for the private injury, or the public scandal or disorder occasioned by his conduct, are not abolished by the protection extended to the press in our Constitutions. The words of Parker, C. J., of Massachusetts, on this subject, have been frequently quoted, generally recognized as sound in principle, and accepted as authority. 'Nor does our Constitution or Declaration of Rights,' he says, speaking of his own state, 'abrogate the common law in this respect, as some have insisted. The sixteenth article declares that "liberty of the press is essential to the security of freedom in a State. It ought not, therefore, to be restrained in this commonwealth."' The liberty of the press, not its licentiousness; this is the construction which a just regard to the other parts of that instrument, and to the wisdom of those who founded it, requires. In the eleventh article it is declared that 'every subject of the commonwealth ought to find a certain remedy by having recourse to the laws for all injuries or wrongs which he may receive in his person, property, or character'; and thus the general declaration in the sixteenth article is qualified. Besides, it is well understood and received as a commentary on this provision for the liberty of the press that it was intended to prevent all such previous restraints upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep firearms, which does not protect him who uses them for annoyance or destruction."

This is the true rule. The liberty of the press means that any one can publish anything he pleases, but he is liable for the abuse of this liberty. If he does this by scandalizing the

courts of his country, he is liable to be punished for contempt. If he slanders his fellowmen, he is liable to a criminal prosecution for libel, and to respond, civilly, in damages for the injury he does to the individual. In other words, the abuse of the privilege consists principally in not telling the truth. It is no new claim that newspapers have a greater privilege than the ordinary citizen. This is a grave error. In *King v. Root*, 4 Wend. 113, 21 Am. Dec. 102, Chancellor Walworth said: "It has been urged upon you that conductors of the public press are entitled to peculiar indulgences, and have special rights and privileges. The law recognizes no such peculiar rights, privileges, or claims to indulgence. They have no rights but such as are common to all. They have just the same rights that the rest of the community have, and no more. They have the right to publish the truth, but no right to publish falsehood to the injury of others with impunity." And in *Hotchkiss v. Oliphant*, 2 Hill, 510, Chief Justice Nelson, speaking for the Supreme Court of New York, said: "It is made a point in this case, and was insisted upon in argument, that the editor of a public newspaper is at liberty to copy an item of news from another paper, giving at the same time his authority, without subjecting himself to legal responsibility, however libelous the article may be, unless express malice be shown. It was conceded that the law did not and ought not to extend a similar indulgence to any other class of citizens; but counsel said that a distinction should be made in favor of editors on the ground of the peculiarity of their occupation; that their business was to disseminate useful knowledge among the people; to publish such matters relating to the current events of the day happening at home or abroad as fell within the sphere of their observation, and as the public curiosity or taste demanded; and that it was impracticable for them at all times to ascertain the truth or falsehood of the various statements contained in other journals. We are also told that, if the law were not thus indulgent, some legislative relief might become necessary for the protection of this class of citizens. Undoubtedly, if it be desirable to pamper a depraved public appetite or taste, if there be any such, by the republication of all the falsehoods and calumnies upon private character that may find their way into the press, to give encouragement to the widest possible circulation of these vile and defamatory publications by protecting the retailers of them, some legislative interference will be necessary, for no countenance can be found for the irresponsibility claimed in the common law. That reprobates the libeler, whether author or publisher, and subjects him to both civil and criminal responsibility. His offense is there ranked

with that of the receiver of stolen goods, the perjurer and suborner of perjury, the disturber of the peace, the conspirator, and other offenders of like character. * * * The act of publication is an adoption of the original calumny, which must be defended in the same way as if invented by the defendant. The republication assumes and indorses the truth of the charge, and, when called on by the aggrieved party, the publisher should be held strictly to the proof. If he chooses to become the indorser and retailer of private scandal, without taking the trouble of inquiring into the truth of what he publishes, there is no ground for complaint if the law, which is as studious to protect the character as the property of the citizen, holds him to this responsibility. The rule is not only just and wise in itself, but, if steadily and inflexibly adhered to and applied by courts and juries, will greatly tend to the promotion of truth, good morals, and common decency on the part of the press, by inculcating caution and inquiry into the truth of charges against private character before they are published and circulated throughout the community."

Time was, when, if any citizen or newspaper insulted or slandered or maligned a citizen, the injured party demanded satisfaction according to the code of honor, and, if this was refused, treated the offender as a mad dog is usually dealt with. It is worthy of notice that in those days every one was careful to tell the truth about his fellowmen, and equally careful to avoid scandalizing them. But even in those days there were occasional breaches of decency in this regard, which were promptly dealt with. A sentiment, however, grew up that such a method settled nothing; that the innocent party was as liable to be removed or hurt as the guilty, and that the result did not show which told the truth. Thus public sentiment discouraged, if it did not forbid, such a method of settling such grievances, and it was insisted that the remedies afforded by the laws were ample to properly handle all such matters, and hence that any one aggrieved must not take the law in his own hands, but must let the courts settle it. So the old method has become nearly obsolete; but even now it is occasionally resorted to when the offense is peculiarly aggravated, and so indecent that it is impossible for human nature to stand it.

Now, it is gravely argued by libelers that the liberty of the press includes a right to scandalize courts, to libel and slander and utter the most flagrant and indecent calumnies about public officers, and even private citizens, and to invade the sanctuaries of the churches, the temples of justice, or the sacredness of the home and the private family, and without any

good motive, or for any public purpose, to publish the most cruel, false, and scandalous articles concerning them. And there are newspapers that have so far misconceived their proper functions, or been misguided by other considerations, as to indulge in such practices. And there is always a class of moral perverts and degenerates in every community who feed their morbid appetites upon such scandals, and rejoice at the injury thus done to those who are so infinitely their superiors, that they are not worthy to fasten the latchet of their shoes. But, to the credit of the newspaper profession, it is due to here make a record of the fact that the great majority of the members of that profession do not approve or sanction such practices, or such "yellow" journalism, but have a proper appreciation of the rights and purposes and functions of a newspaper, and deplore the fact that such unworthy persons are engaged in the profession, as much as lawyers deplore the black sheep that will sometimes creep into the fold. The contrast between the two classes marks the difference between respectability and indecency, between intelligence and ignorance, between the law-abiding, patriotic citizen and the Ishmaelite—the assassin of character for the accumulation of lucre. The great body of the people condemn such practices and such miscreants, and the courts would deserve condemnation and abolition if they did not vigorously and fearlessly punish such offenders. Such practices are an abuse of the liberty of the press, and if the slander relates to the courts it concerns the whole public, and is therefore punishable summarily as a criminal contempt; and if it concerns an individual it is punishable civilly and criminally as for a libel.

There is no species of property and no class of people that need the protection of the law as much as newspapers and editors, and they would feel the loss of such protection more speedily and more acutely than any one else. Self-interest should, therefore, induce them not to impair the power or authority of the courts, and not to inculcate a feeling of disrespect or want of confidence in the courts. Curran called the liberty of the press a "sacred palladium." But without the shield and bulwark of the law and the courts, even the Goddess Pallas would be unable to protect the press, or to preserve the rights and safety and peace of the people. Without the law and the courts, chaos and anarchy would prevail. There would be no protection for life, liberty, property, or character. He, therefore, who seeks to destroy the authority of the courts, invites anarchy, and sows seed for his own undoing. It is the liberty of the press that is guarantied, not the licentiousness. It is the right to speak the truth, not the right to

bear false witness against your neighbor. Every citizen has a constitutional right to the enjoyment of his character as well as to the ownership of his property, and this right is as sacred as the liberty of the press. In *King v. Burdett*, 4 Barn. & Ald. 95, it was said: "The liberty of the press cannot impute criminal conduct to others without violating the right of the character, and that right can only be attacked in a court of justice, where the party attacked has a fair opportunity of defending himself. Where vituperation begins, the liberty of the press ends." * * *

STATE v. PIONEER PRESS CO.

(Supreme Court of Minnesota, 1907. 100 Minn. 173, 110 N. W. 867, 9 L. R. A. [N. S.] 480, 117 Am. St. Rep. 684, 10 Ann. Cas. 351.)

LEWIS, J. Appellant was indicted for publishing an account of the execution of William Williams, in violation of the provisions of chapter 20, p. 66, Gen. Laws 1889. The act requires that executions take place before the hour of sunrise on the day designated, in an inclosure from which the public are excluded, and in the presence of the following persons only: "Section 5. Besides the sheriff and his assistants, the following persons may be present at the execution, but none other. The clergyman, or priest, in attendance upon the prisoner, and such other persons as the prisoner may designate, not exceeding three in number, a physician or surgeon, to be selected by the sheriff, and such other persons as the sheriff may designate, not exceeding six in number, but no person so admitted shall be a newspaper reporter or representative. No account of the details of such execution beyond the statement of the fact that such convict was on the day in question duly executed according to law, shall be published in any newspaper." Briefly stated, the indictment charged that appellant, on February 13, 1906, did print and publish the details of the execution by setting out the movements of the officers and the convict from the time they left the jail until they reached the scaffold, the last statement of the prisoner, the manner in which he was prepared for execution, the adjustment of the noose and the black cap, the springing of the trap, the pronouncement of death, the removal of the body to the undertaker's rooms, and the autopsy performed under the supervision of the coroner. The indictment was demurred to upon the ground that the facts stated therein do not constitute a public offense. The demurrer was overruled by the trial court, and, in view of their importance, certain questions were certified to this court.

1. Chapter 20, p. 66, Gen. Laws 1889, is not in violation of section 27, art. 4, of the Constitution, which requires that no law shall embrace more than one subject, which shall be expressed in its title. [This point is here fully discussed.]

2. It is again submitted that the act violates the provision of section 3, art. 1, of the Constitution: "The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such rights." Mr. Cooley traces the history of this provision, and shows that, although it was directly aimed at the removal of previous restraints upon public speech and freedom of the press, yet it does not follow that there is a constitutional right to publish every fact or statement which may be true. "We understand liberty of speech and of the press to imply, not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords." Const. L'im. (7th Ed.) 605. But he also states: "If the nature of the case is such as to make it improper that the proceedings should be spread before the public, because of their immoral tendency, or of the blasphemous or indecent character of the evidence exhibited, the publication, though impartial and full, will be a public offense, punishable accordingly." Page 637. Chancellor Kent defined the liberty of the press under the Constitution as follows: "The liberty of the press consists in the right to publish with impunity truth with good motives and for justifiable ends, whether it respects the government magistracies, or individuals." *People v. Croswell*, 3 John. Cas. 393. Mr. Story states that the constitutional prohibition "places no restraint upon the power of the Legislature to punish for the publication of matter which is injurious to society according to the standard of the common law. It does not deprive the state of the primary right of self-preservation."

Appellant, citing *State v. Shepherd* (Mo. Sup.) 76 S. W. 79, argues that there are no constitutional limitations upon the liberty of the press, unless the subject-matter be blasphemous, obscene, seditious, or scandalous in its character. This is altogether too restricted a view. The principle is the same, whether the subject-matter of the publication is distinctly blasphemous, seditious, or scandalous, or of such character as naturally tends to excite the public mind and thus indirectly affect the public good. If the constitutional provision has reference to restricting the publication by newspapers of unwholesome matter, as in *State v. McKee*, 73 Conn. 18, 46 Atl. 409, 49 L. R. A. 542, 84 Am. St. Rep. 124, and *In re*

Banks, 56 Kan. 242, 42 Pac. 693, or the use of the United States mails for the distribution of obscene literature, as in *United States v. Harmon* (D. C.) 45 Fed. 414, or the publishing of anarchistic doctrines, as in *People v. Most* (Sup.) 75 N. Y. Supp. 591, upon the ground that it is in the interest of public morals, then for the same reason the right of restriction applies to publishing details of criminal executions. The article in question is moderate, and does not resort to any unusual language, or exhibit cartoons for the purpose of emphasizing the horrors of executing the death penalty; but if, in the opinion of the Legislature, it is detrimental to public morals to publish anything more than the mere fact that the execution has taken place, then, under the authorities and upon principle, the appellant was not deprived of any constitutional right in being so limited.

3. Section 6, art. 1, of the Constitution, which requires that in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial, has no application to this question. "Public trial" means trial by jury, perhaps including the rendition of judgment; but, after the accused is convicted and sentenced, the trial is over. In *Holden v. Minnesota*, 137 U. S. 491, 11 Sup. Ct. 143, 34 L. Ed. 734, in considering the provisions of chapter 20, p. 66, Laws 1889, the court say: "Whether a convict sentenced to death shall be executed before or after sunrise, or within or without the walls of the jail, or within or outside of some other inclosure, and whether the inclosure within which he is executed shall be higher than the gallows, thus excluding the view of persons outside, are regulations that do not affect his substantial rights. The same observation may be made touching the restriction in section 5 as to the number and character of those who may witness the execution and the exclusion altogether of reporters or representatives of newspapers. These are regulations which the Legislature, in its wisdom and for the public good, could legally prescribe in respect to executions occurring after the passage of the act, and cannot, even when applied to offenses previously committed, be regarded as *ex post facto* within the meaning of the Constitution." Although the court then had under consideration whether certain provisions were *ex post facto*, the language applies also with reference to the constitutional restrictions referred to. The extent of the limitation must be left to the wisdom of the Legislature, and in this instance we find no infringement upon any rights guarantied by the Constitution.

Affirmed.³⁹

³⁹ The defendant's conviction was approved, thereby holding the statute to be constitutional.

SECTION 2.—SEDITIONOUS AND KINDRED UNLAWFUL WRITINGS

RESPUBLICA v. DENNIE.

(Nisi Prius, Philadelphia, 1805. 4 Yeates [Pa.] 267, 2 Am. Dec. 402.)

Indictment for libel. The facts sufficiently appear in the charge to the jury.

YEATES, J., delivered the charge to the jury, substantially as follows:

We possess no political characters on this bench. We are bound by every tie of religion and duty to see that the laws of the country shall be the rule of conduct, and that justice shall flow in her usual and accustomed channels, without respect to persons.

The defendant stands indicted, as a factious and seditious person, of a wicked mind, and unquiet and turbulent disposition and conversation, seditiously, maliciously and willfully intending, as much as in him lay, to bring into contempt and hatred, the independence of the United States, the Constitution of this commonwealth and of the United States, to excite popular discontent and dissatisfaction against the scheme of polity instituted and upon trial in the said United States, and in the said commonwealth, to molest, disturb and destroy the peace and public tranquility of the said United States, and of the said commonwealth, to condemn the principles of the revolution, and revile, depreciate and scandalize the characters of the Revolutionary patriots and statesmen, to endanger, subvert and totally destroy the republican Constitutions and free governments of the said United States, and this commonwealth, to involve the said United States, and this commonwealth in civil war, desolation and anarchy, and to procure by art and force, a radical change and alteration in the principles and forms of the said Constitution and governments, without the free will, wish and concurrence of the people of the said United States, and this commonwealth respectively, and to fulfill, perfect and bring to effect his wicked, seditious and detestable intentions aforesaid, he the said Joseph Dennie, on the 23d of April, 1803, at the city of Philadelphia, falsely, maliciously, factiously and seditiously did make, compose, write and publish the following libel, to wit:

"A democracy is scarcely tolerable at any period of national history. Its omens are always sinister, and its powers are unpropitious. With all the lights of experience blazing before our eyes, it is impossible not to discover the futility

of this form of government. It was weak and wicked at Athens, it was bad in Sparta, and worse in Rome. It has been tried in France, and terminated in despotism. It was tried in England, and rejected with the utmost loathing and abhorrence. It is on its trial here, and its issue will be civil war, desolation and anarchy. No wise man but discerns its imperfections, no good man but shudders at its miseries, no honest man but proclaims its fraud, and no brave man but draws his sword against its force. The institution of a scheme of polity so radically contemptible and vicious, is a memorable example of what the villainy of some men can devise, the folly of others receive, and both establish in despite of 'reason, reflection, and sensation.'"

This publication is stated to have been made in a certain weekly paper called the Port Folio, and the act is charged in the indictment to have been committed "in manifest contempt of the Constitution and laws of the said United States and this commonwealth, in derogation of the national independence, reputation, and honor, to the evil example of all others in the like case offending, and against the peace and dignity of the commonwealth of Pennsylvania."

Is the defendant guilty or not of the facts and intentions charged, is the question to be tried. The case is admitted to be of high moment.

The seventh section of the ninth article of the Constitution of the state, must be our guide upon this occasion; it forms the solemn compact between the people and the three branches of the government, the legislative, executive, and judicial powers. Neither of them can exceed the limits prescribed to them respectively. To this exposition of the public will, every branch of the common law, and of our municipal acts of assembly must conform; and if incompatible therewith, they must yield and give way. Judicial decisions cannot weigh against it when repugnant thereto. It runs thus:

"The printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature, or any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write or print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers, investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury shall have a right to determine the law

and the facts, under the direction of the court, as in other cases."

Thus it is evident, that legislative acts, or of any branch of the government, are open to public discussion; and every citizen may freely speak, write or print on any subject, but is accountable for the abuse of that privilege. There shall be no licenses of the press. Publish as you please in the first instance without control; but you are answerable both to the community and the individual, if you proceed to unwarrantable lengths. No alteration is hereby made in the law as to private men, affected by injurious publications, unless the discussion be proper for public information. But "if one uses the weapon of truth wantonly, for disturbing the peace of families, he is guilty of a libel." Per General Hamilton in *Croswell's trial*, page 70. The matter published is not proper for public information. The common weal is not interested in such a communication, except to suppress it.

What is the meaning of the words "being responsible for the abuse of that liberty," if the jury are interdicted from deciding on the case? Who else can constitutionally decide on it? The expressions relate to and pervade every part of the sentence. The objection, that the determination of juries may vary at different times, arising from their different political opinions, proves too much. The same matter may be objected against them, when party spirit runs high, in other criminal prosecutions. But we have no other constitutional mode of decision pointed out to us, and we are bound to use the method prescribed.

It is no infraction of the law to publish temperate investigations of the nature and forms of government. The day is long past, since Algernon Sidney's celebrated treatise on government, cited on this trial, was considered as a treasonable libel. The enlightened advocates of representative republican government pride themselves in the reflection that, the more deeply their system is examined, the more fully will the judgments of honest men be satisfied, that it is the most conducive to the safety and happiness of a free people. "Such matters are proper for public information." But there is a marked and evident distinction between such publications and those which are plainly accompanied with a criminal intent, deliberately designed to unloosen the social bond of union, totally to unhinge the minds of the citizens, and to produce popular discontent with the exercise of power by the known constituted authorities. The latter writings are subversive of all government and good order. "The liberty of the press consists in publishing the truth, from good motives and for justifiable ends, though it reflects on government or on magis-

trates." Per General Hamilton in *Croswell's trial*, pages 63, 64. It disseminates political knowledge, and by adding to the common stock of freedom, gives a just confidence to every individual. But the malicious publications which I have reprobated, infect insidiously the public mind with a subtle poison, and produce the most mischievous and alarming consequences, by their tendency to anarchy, sedition, and civil war. We cannot, consistently with our official duty, pronounce such conduct dispunishable. We believe that it is not justified by the words or meaning of our Constitution. It is true, it may not be easy in every instance, to draw the exact distinguishing line. To the jury, it peculiarly belongs to decide on the intent and object of the writing. It is their duty to judge candidly and fairly, leaning to the favourable side, where the criminal intent is not clearly and evidently ascertained.

It remains, therefore, under our most careful consideration of the ninth article of the Constitution, for the jury to divest themselves of all political prejudices (if any such they have), and dispassionately to examine the publication in the *Port Folio*, which is the ground of the present prosecution. They must decide on their oaths, as they will answer to God and their country, whether the defendant, as a factious and seditious person, with the criminal intentions imputed to him, in order to accomplish the objects stated in the indictment, did make and publish the writings in question. Should they find the charges laid against him in the indictment to be well founded, they are bound to find him guilty. They must judge for themselves on the plain import of the words, without any forced or strained construction of the meaning of the author or editor, and determine on the correctness of the innuendoes. To every word they will assign its natural sense, but will collect the true intention from the context, the whole piece. They will accurately weigh the probabilities of the charge against a literary man. Consequences they will wholly disregard, but firmly discharge their duty. Representative republican governments stand on immovable bases, which cannot be shaken by theoretical systems; yet if the consciences of the jury shall be clearly satisfied that the publication was seditiously, maliciously, and willfully aimed at the independence of the United States, the Constitution thereof, or of this state, they should convict the defendant. If, on the other hand, the production was honestly meant to inform the public mind, and warn them against supposed dangers in society, though the subject may have been treated erroneously; or that the censures on democracy were bestowed on pure unmixed democracy, where the people en masse execute the

sovereign power without the medium of their representatives (agreeably to our forms of government), as have occurred at different times in Athens, Sparta, Rome, France and England, then, however the judgments of the jury may incline them to think individually, they should acquit the defendant. In the first instance, the act would be criminal; in the last, it would be innocent. If the jury should doubt of the criminal intention, then also the law pronounces, that they should be acquitted. 4 Burr. 2552, per Lord Mansfield.

Thus have we endeavored to discharge our official duty to the jury, with impartiality. It rests with them to discharge their duties, virtuously and conscientiously, agreeably to the true spirit of our Constitution and laws.

Verdict, not guilty.

PEOPLE v. MOST.

(Court of Appeals of New York, 1902. 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509.)

VANN, J. The defendant was convicted of violating section 675 of the Penal Code, in that on the 7th of September, 1901, at the city of New York, he willfully and wrongfully committed an act which seriously endangered the public peace. He was the publisher of a weekly newspaper called the "Freiheit," and the wrongful act consisted in the publication of an article in that paper advocating and advising revolution and murder. The defendant admitted the publication of the article, but testified that it was written by one Carl Heinzen, and first appeared 50 years ago in a paper called the "Pioneer," published in Boston. He further testified that he published the article on the same day that President McKinley was shot, and that as soon as he heard of that event, "thinking it might be taken the wrong way,—that some might think that it was published for that occasion,"—he "tried to get the copies back and take it out of circulation."

The article was very long, but the following extracts will suffice for the purpose of this review:

It was entitled "Murder vs. Murder," and the opening sentence is as follows: "As Heinzen said nearly fifty years ago (this is true even to-day), there are various technical expressions for the important manipulation by which one human being destroys the life of another." Various definitions of "murder" follow, and it is stated that the purpose of murder is always the same,—"the destruction of a life that is hostile or a hindrance." It is then declared, in substance, that, as "the dominant barbarism" (meaning constituted authority)

punishes murder by murder, "humanity is forced by necessity to use a weapon,—to become the murderess of murderers. If murder is permitted to any one person, it is also permitted to all,—especially to those who practice it for the purpose of destroying the professional murderers or the murderers by the grace of God."

This ends the first paragraph of the article, which continues without quotation marks, or anything to indicate that the remainder was written except for the purpose of publication in the *Freiheit*. After a long argument aiming to show that all government is founded on murder, the declaration is made: "We have the representatives of murder before us in all forms. There they stand awaiting our judgment and our decision. They tell us with praiseworthy decisiveness, 'We have murdered, we murder and we will murder as long as we can, we will murder in order to rule, just as you must murder in order to become free.' No further dispute on this question whether murder is an inevitable necessity,—we maintain it; no further dispute over the question whether it (murder) is a right,—we practice it." Then follow, at intervals, sentences and paragraphs of which the following are specimens:

"Does not the whole world still declare that to be government which is nothing more than murder dominion?"

"Humanity, you have lost your conscience or reason. You recognize it, the victor (meaning government) is right; that is to say, murder is right. You can save your conscience as well as your reason if you abolish murder, by turning it against all murderers, so as to bring about the fact that right practices murder. Let murder be our study,—murder in every form. In this one word lies more humanity than in all our theories."

"The greatest of all follies in the world is the belief that there exists a crime against despots and their myrmidons (meaning public rulers and their officers of justice). They are in human society what the tiger is among animals. To spare them is a crime. As despots permit themselves everything,—betrayal, poison, murder, etc.,—in the same way all this is to be employed against them. Yes, crime directed against them is not only right, but it is the duty of every one who has an opportunity to commit it, and it would be a glory to him if it was successful."

"The laws of despots are nothing but the dictates of the sword. Their property is nothing less than plunder. Their punishment is nothing less than murder. No one can become a criminal as far as their 'laws' are concerned. On their murder heads a revolutionist can only become a liberator of humanity. In all struggles between reaction (meaning gov-

ernment) and revolution, it goes without saying that reaction is the attacking party. Revolution is nothing more than a necessary defense. Murder, as a necessary defense, is not only permissible, but it is sometimes a duty toward society when it is directed against a professional murderer."

"We know our enemies. We know them all personally in every place. There is absolutely no more excuse if they were again spared. * * * Let the people execute the judgment. The way of humanity leads over the summit of barbarism. This is just the law of necessity dictated by reaction. We cannot go around it, as we do not wish to renounce the future. If we wish the design, we must also wish the means. If we wish the life of the peoples, we must wish for the death of their enemies. If we wish for humanity, we must wish for murder."

"We say, murder the murderers, save humanity, through blood and iron, poison and dynamite."

Section 675 of the Penal Code provides, among other things, that "a person who willfully and wrongfully commits any act * * * which seriously disturbs or endangers the public peace * * * for which no other punishment is expressly prescribed by this Code, is guilty of a misdemeanor." Two questions are presented for decision: (1) Did the publication of the article in question constitute a crime under section 675 of the Penal Code? (2) Did the conviction of the defendant violate the constitutional guaranty of freedom of the press?

So far as the meaning, intent, and effect of the article involve a question of fact, we are concluded by the concurrent action of the courts below; but the simple interpretation of the paper, without regard to extraneous facts, presents a question of law for us to decide. While the application intended, or any hidden or ambiguous meaning which may be discovered by reading between the lines, or by the aid of surrounding circumstances, may involve a question of fact, the obvious and natural meaning is to be determined as a question of law. If the article advocates revolution and murder, it is not important that it should have been written by the defendant, but it is sufficient if he adopted the words of another to express his wishes. If he intended to convey the idea that the entire article was written by Heinzen, he nevertheless adopted it by the statement in parentheses, which was his own, that "this is true even to-day." He thus indorsed the sentiments expressed and ratified the advice given. Moreover, the tone and tenor of his statements, arguments, and exhortations apply to the present time, and call for action on the part of his readers without delay. The article was published without quotation marks, and without comment, criticism,

or dissent; and a fair reading thereof leaves the impression upon the mind that only the opening sentence or sentences were written by Heinzen, and that the remainder was the work of the publisher.

This conclusion is strengthened by the internal evidence that the writing was of recent origin, such as the use of the word "dynamite," which occurs twice, yet that word was not in use 50 years ago, when Heinzen is alleged to have written his dissertation on murder. Title "Dynamite," *Worcester Dict.* (Ed. 1859); *Webster*, (Ed. 1864); *Ency. Brit.* (Ed. 1878); *Alden's Cyc.*; *Murray's New Oxford Dict.*; *Harper's Book of Facts*; *Townsend's Manual of Dates*. The object of the article, as we interpret it, was not to criticise or discuss public officers or public affairs, but to denounce government as "murder dominion," and to advocate the murder of those who govern. While it was written with special reference to rulers who wear crowns, it recommends the murder of all rulers, without exception, express or implied. The argument is that, as the enforcement of law is murder, the assassination of those who enforce the law is not only justifiable, but to spare them would be a crime. It calls the constituted authorities murderers, and urges its readers to "murder the murderers." Its tendency is to incite and stimulate the destruction of government and its agents "through blood and iron, poison and dynamite." It teaches the doctrine that government is founded on murder, that all rulers are enemies of the human race, and that "crime directed against them is not only right, but it is the duty of every one who has an opportunity to commit it, and it would be a glory to him if it was successful." The publisher exhorts his readers to "let murder be our study, —murder in every form,"—when directed against those who preserve order and enforce law. Government is described as "reaction," and not only is the murder of those having authority upheld and urged, but revolution against government as "the attacking party" is proclaimed as "nothing more than necessary defense."

Further analysis is unnecessary. While the publication was not addressed to any one in particular, it was impliedly addressed to the readers of the *Freiheit*; and, while it did not urge the murder of any particular individual, it advocated the murder of all rulers, and the destruction of all government. A publication which instigates revolution and murder, which suggests the persons to be murdered, through the positions occupied and the duties performed by them, which advises all to discharge their duty to the human race by murdering those who enforce the law, which denounces those who spare the ministers of public justice as guilty of a crime

against humanity, and which names poison and dynamite as the agencies to be used to murder and destroy, necessarily endangers the public peace. A breach of the peace is an offense well known to the common law. It is a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community. Barb. Cr. Law, 219; Archb. Cr. Prac. 91; Bish. Cr. Law, § 533; Clark & M. Crimes, 983; McLean, Cr. Law, § 1012. It may be committed by written words, as a libel has been indictable for time out of mind because it tends to produce violence, or even by spoken words, provided they tend to provoke immediate violence.

The defendant was not charged with an actual breach of the peace, which is a distinct offense both at common law and by statute, but with an act alleged to seriously endanger it. The public peace is in danger when a breach thereof is likely to occur in the ordinary course of events. The publication of the defendant manifestly tended toward this result, for he held forth murder as a duty, and exhorted his readers to practice it upon their rulers. What would be more apt to alarm the people and disturb the peace of society? If the words used by him would not, what words could? As we said when the defendant was before us on another appeal, involving a somewhat similar crime, "No one can foresee the consequences which may result from language such as was used on this occasion. * * *" *People v. Most*, 128 N. Y. 108, 115, 27 N. E. 970, 26 Am. St. Rep. 458. He not only defended, but advised, the most serious crime known to the law. His language was an invitation to murder. He who counsels murder becomes a murderer if his advice is taken. Such advice given to the 3,000 subscribers, and to more than that number of readers, of the defendant's paper, might naturally, as the history of the times shows, result in violence and murder. The courts cannot shut their eyes to the fact that there are elements in our population, small in number, but reckless and aggressive, who are ready to act on such advice, and to become the assassins of those whom the people have placed in authority. The public peace is seriously endangered when arguments are made and advice given which may naturally result even in a simple breach of the peace; and, when the arguments and advice are of such an alarming and dangerous character as to naturally lead to the assassination of public officers, punishment and repression are essential to the welfare of society and the safety of the state. We think that the act of the defendant was a violation of the Penal Code, and constituted a misdemeanor, under the section cited.

The Constitution of our state provides that "every citizen

may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Article 1, § 8. While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the Constitution, and authority to provide for and punish such abuse is left to the Legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime, or destroy organized society is essential to the security of freedom and the stability of the state. While all the agencies of government—executive, legislative, and judicial—cannot abridge the freedom of the press, the Legislature may control and the courts may punish the licentiousness of the press. "The liberty of the press," as Chancellor Kent declared in a celebrated case, "consists in the right to publish, with impunity, truth, with good motives and for justifiable ends whether it respects governments, magistracy, or individuals." *People v. Croswell*, 3 Johns. Cas. 336, 393. Mr. Justice Story defined the phrase to mean "that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so, always, that he does not injure any other person in his rights, person, property, or reputation; and so, always, that he does not thereby disturb the public peace or attempt to subvert the government." Story, Comm. § 1874.

The Constitution does not protect a publisher from the consequences of a crime committed by the act of publication. It does not shield a printed attack on private character, for the same section from which the above quotation is taken expressly sanctions criminal prosecution for libel. It does not permit the advertisement of lotteries, for the next section prohibits lotteries and the sale of lottery tickets. It does not permit the publication of blasphemous or obscene articles, as the authorities uniformly hold. *People v. Ruggles*, 8 Johns. 290, 297, 5 Am. Dec. 335; *People v. Muller*, 96 N. Y. 408, 48 Am. Rep. 635; *In re Rapier*, 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93. It places no restraint upon the power of the Legislature to punish the publication of matter which is injurious to society according to the standard of the common law. It does not deprive the state of the primary right of self-preservation. It does not sanction unbridled license, nor authorize the publication of articles prompting the commission of murder or the overthrow of government by force. All courts and commentators contrast the liberty of the press with its licentiousness, and condemn, as not sanctioned by the Constitution of any state, appeals designed to destroy the reputation of the citizen, the peace of society, or the existence

of the government. Story, Const. § 1878; Cooley, Const. Lim. 518; Ordr. Const. Leg. 237; Tied. Lim. § 81. We think that no constitutional right of the defendant was violated by his conviction, and that the judgment pronounced against him was rendered in accordance with law.

The judgment should be affirmed.

PARKER, C. J., and GRAY, HAIGHT, MARTIN, CULLEN, and WERNER, JJ., concur.

Judgment affirmed.⁴⁰

⁴⁰ "Whoever by language, written or spoken, incites or encourages others to use physical force or violence, in some public matter connected with the state, is guilty of publishing a seditious libel. The test whether the statement is a seditious libel is not either the truth of the language or the innocence of the motive with which the statement is published, but is this: Is the language calculated to promote public disorder or physical force or violence in a matter of state? Per Lord Coleridge, J., in *Rex v. Aldred* (1909) 74 J. P. 55." Odgers, *Libel and Slander* (5th Ed.) p. 513.

"At the common law it was indictable to publish anything against the Constitution of the country, or the established system of government. The basis of such a prosecution was the tendency of publications of this character to excite disaffection with the government, and thus induce a revolutionary spirit. The law always, however, allowed a calm and temperate discussion of public events and measures, and recognized in every man a right to give every public matter a candid, full, and free discussion. It was only when a publication went beyond this, and tended to excite tumult, that it became criminal. It cannot be doubted, however, that the common-law rules on this subject were administered in many cases with great harshness. * * * Repression of full and free discussion is dangerous in any government resting upon the will of the people." Cooley, *Constitutional Limitations* (7th Ed.) pp. 612-615.

In *Davis v. Beason*, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637, it was held that, since polygamy may be declared a crime without violating religious rights it may also be made a crime to advocate polygamy.

The following are a list of more recent cases dealing with incitement to crime: *State v. Fox*, 71 Wash. 185, 127 Pac. 1111 (1912); *State v. Quinlan*, 86 N. J. Law, 120, 91 Atl. 111 (1914); *Ex parte Meckel*, 87 Tex. Cr. R. 120, 220 S. W. 81 (1919); *State v. Tachim*, 92 N. J. Law, 269, 106 Atl. 145 (1919); *State v. Gabriel*, 95 N. J. Law, 337, 112 Atl. 611 (1921); *Colgan v. Sullivan*, 94 N. J. Law, 201, 109 Atl. 568 (1920).

There are acts in several states, which were passed either during or since the war, which condemn advocacy of the forceful overthrow of government or the destruction of property. They are directed at syndicalism and sabotage, so called. The Illinois Act, passed in 1919 (*Laws* 1919, p. 420), is typical, and is as follows:

Section 265a. It shall be unlawful for any purpose openly to advocate, by word of mouth or writing, the reformation or overthrow, by violence or any other unlawful means, of the representative form of government now secured to the citizens of the United States and the several states by the Constitution of the United States and the Constitutions of the several states.

Section 265b. It shall be unlawful for any person to publish, issue or knowingly sell or distribute any book, paper, document or oth-

UNITED STATES v. PIERCE.

(District Court of the United States, N. D. New York, 1917.
245 Fed. 878.)

RAY, District Judge.⁴¹ * * * June 15, 1917, Congress enacted what is commonly known as the Espionage Act (Act June 15, 1917, c. 30), approved that day, and which is entitled "An act to punish acts of interference with the foreign relations, the neutrality and the foreign commerce of the United States, to punish espionage and better to enforce the crim-

er written or printed matter which advocates crime and violence, as a means of accomplishing the reformation or overthrow of the constitutional representative form of government so secured to the citizens of the United States and the several states.

Section 265c. It shall be unlawful for any person to organize, aid in the organization of, or become a member of any society or association, the object of which is to advocate the reformation or overthrow of the existing form of government, by violence or any other unlawful means.

Section 265d. It shall be unlawful for any person voluntarily and with knowledge of the purpose of such meeting or assembly to be present at any meeting or assembly at which the reformation or overthrow of the existing form of government, by crime and violence is advocated.

Section 265e. It shall be unlawful for any person owning, possessing or controlling the use of any room, building or other premises, knowingly to permit the same to be used as the headquarters of any organization which advocates crime and violence or as a meeting place for any meeting or assembly at which crime and violence is advocated, as a means of accomplishing the reformation or overthrow of the existing form of government.

Section 265f. It shall be unlawful to display or exhibit at any meeting, gathering or parade, public or private, any flag, banner, emblem or other insignia, symbolizing or intending to symbolize a purpose to overthrow by force or violence or by physical injury to person or property of the representative form of government now secured to the citizens of the United States and the several states by the Constitution of the United States and the Constitution of the state of Illinois.

Sec. 265g. Any person who shall violate sections 265a, 265b, 265c, or 265f of this act shall be deemed guilty of a felony, and upon conviction therefor shall be punished by imprisonment in the penitentiary for a period of not less than one year nor more than ten years. Any person who shall violate sections 265d and 265e of this Act shall be deemed guilty of the misdemeanor, and upon conviction therefor shall be punished by a fine of not less than five hundred dollars (\$500.00) nor more than one thousand dollars (\$1,000.00), or imprisonment in the county jail for a period of not less than six months nor more than one year, or both.

Approved June 28, 1919.

A similar act in Washington has been held constitutional in *State v. Hennessy*, 114 Wash. 351, 195 Pac. 211 (1921), and in *Oregon, in State v. Laundry*, 204 Pac. 958 (1922).

⁴¹ Parts of the opinion are omitted.

inal laws of the United States, and for other purposes." Section 3 of this act reads as follows:

"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both."

It is seen at a glance that whoever, when the United States is at war, willfully makes or conveys false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, commits a crime against the United States. It is not necessary that the operation or success of the military or naval forces be actually interfered with, or that the success of its enemies be actually promoted. The making or conveyance of false reports or false statements with the intent to interfere with the operation or success of either the military or naval forces of the United States or to promote the success of the enemies of the United States is all-sufficient.

The defendants have extensively circulated and spread broadcast a printed pamphlet or circular containing, with other things, the following:

"Conscription is upon us; the draft law is a fact!

"Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the army;

"Stand them up in long rows, break them into squads and platoons, teach them to deploy and wheel;

"Guns will be put into their hands; they will be taught not to think, only to obey without questioning.

"Then they will be shipped through the submarine zone by the hundreds of thousands to the bloody quagmire of Europe.

"Into that seething, heaving swamp of torn flesh and floating entrails they will be plunged, in regiments, divisions and armies, screaming as they go.

"Agonies of torture will rend their flesh from their sinews, will crack their bones and dissolve their lungs; and every pang will be multiplied in its passage to you.

"Black death will be a guest at every American fireside; mothers and fathers and sisters, wives and sweethearts will know the weight of that awful vacancy left by the bullet which finds its mark.

"And still the recruiting officers will come; seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size;

"And still the toll of death will grow.

"Let them come! Let death and desolation make barren every home! Let the agony of war crack every parent's heart! Let the horrors and the miseries of the world-down-fall swamp the happiness of every hearthstone!"

To this is added:

"Then perhaps you will believe what we have been telling you! For war is the price of your stupidity, you who have rejected Socialism!"

Then, after referring to the war and its horrors, we find the following:

"You cannot avoid it; you are being dragged, whipped, lashed, hurled into it; your flesh and brains and entrails must be crushed out of you and poured into that mass of festering decay."

To this is added:

"It is the price you pay for your stupidity—you who have rejected Socialism!"

Then, after referring to food prices, we find the following:

"The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has no time to protect the food supply from gamblers."

Then later:

"We are beholding the spectacle of whole nations working as one person for the accomplishment of a single end—namely, killing. * * *

"We have been telling you all for, lo, these many years that the whole nation could be mobilized and every man, woman and child induced to do his bit for the service of humanity; but you laughed at us.

"Now you call every person traitor, slacker, pro-enemy, who will not go crazy on the subject of killing; and you have turned the whole energy of all the nations of the world into the service of their kings for the purpose of killing, killing, killing.

"Why would you not believe us when we told you that it was possible to co-operate for the saving of life?

"Why were you not interested when we begged you to work

all together to build, instead of to destroy? To preserve, instead of to murder?

"Why did you ridicule us and call us impractical dreamers when we prophesied a world-state of fellow-workers, each man creating for the benefit of all the world, and the whole world creating for the benefit of each man?

"Those idle taunts, those thoughtless jeers, that refusal to listen, to be fair-minded, you are paying for them now.

"Lo, the price you pay! Lo, the price your children will pay! Lo, the agony, the death, the blood, the unforgettable sorrow—the price of your stupidity! * * *

"VII. For this war—as every one who thinks or knows anything will say, whenever truth telling becomes safe and possible again—this war is to determine the question, whether the chambers of commerce of the allied nations or of the Central Empires have the superior right to exploit undeveloped countries.

"It is to determine whether interest, dividends and profits, shall be paid to investors speaking German or to those speaking English and French.

"Our entry into it was determined by the certainty that if the allies do not win J. P. Morgan's loans to the allies will be repudiated, and those American investors who bit on his promises would be hooked."

We have here, not only lurid and exaggerated pictures of the horrors of war, possible and impossible, but many false statements calculated to incite opposition to the war and opposition to the government and also calculated to interfere with the morale of our armies, discourage enlistments, registration, and willing service in our armies, and encourage desertion. These false statements are also calculated to encourage our enemies and discourage and intimidate our own citizens and soldiers, and thereby promote the success of our enemies. It is not true that the recruiting officers will take our sons of military age and "impress them into the army." It is not true that, "You are being dragged, whipped, lashed, hurled into it" (the army or the war). It is not true that, "The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has no time to protect the food supply from gamblers." The Attorney General of the United States is not doing anything of the kind. It is not true that, "We are beholding the spectacle of whole nations working as one person for the accomplishment of a single end—namely, killing." It is not true that, "Now you call every person traitor, slacker, pro-enemy who will not go crazy on the subject of killing; and you have turned the whole energy

of all the nations of the world into the service of their kings for the purpose of killing, killing, killing." It is not true that, "Our entry into it (this war) was determined by the certainty that if the allies do not win J. P. Morgan's loans to the allies will be repudiated and those American investors who bit on his promises would be hooked."

Here is a plain assertion to every intelligent mind that the declaration of war to which reference has been made contains a falsehood, and that such declaration was made because of the fear that the allies might not win, and that in such case J. P. Morgan's loans to the allies would be repudiated, payment refused, and that American investors would lose their loans and suffer loss. In other words, that our entry into this war with Germany was determined upon by Congress to insure, if possible, the success of the allies, to the end that they would fulfill their contracts and pay the loans made them by individuals in the United States. The purposes and motives of our President and of Congress are impugned and grossly misrepresented and falsified. What reports or statements can be more or better calculated to interfere with the operation and success of our military and naval forces in this war, or more or better calculated to promote the success of the enemies of the United States?

It is said, first, this pamphlet is an argument in favor of Socialism and of the Socialistic party; and, second, that such publications are proper and allowable under our Constitution, which prohibits curtailment of freedom of speech and of the press.

The first amendment to the Constitution of the United States provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

If this means that every man and woman in the United States in times of war and national peril may falsely state or say in words, or by means of pamphlets and writings printed and spread broadcast, anything and everything he pleases, however injurious to the general welfare and however grossly false the statements and however detrimental to the success of our military and naval forces the falsehood may be, and that Congress is powerless to enact a law abridging this right, then the law under consideration is unconstitutional except in so far as it merely prohibits the circulation and distribution of such pamphlets containing the false reports and false statements of the nature described. In *Warren v. United States*,

183 Fed. 718, 721, 106 C. C. A. 156, 159 (33 L. R. A. [N. S.] 800) the Circuit Court of Appeals, Eighth Circuit, said:

"Liberty and freedom of speech under the Constitution do not mean the unrestrained right to do and say what one pleases at all times and under all circumstances," etc.

In *United States v. Toledo Newspaper Co.* (D. C.) 220 Fed. 458, it is held that the constitutional guaranty of freedom of the press is not infringed by summary process and conviction of contempt for publication tending to obstruct the administration of justice. If this be correct, why may not Congress enact a law making it an offense to make and spread broadcast, when a state of war exists, pamphlets containing materially false statements which are intended to interfere with and obstruct the lawful raising and organization of armies and the military operations of the government and which pamphlets are calculated to have that effect? Suppose a man goes out and publicly advocates by means of false statements the overthrow of our national government, the disbandment of our lawfully created national armies, organized for national defense in time of war, and puts his false declarations and statements in pamphlet form and circulates them, can it be doubted that Congress may constitutionally prohibit such acts? In *State v. Pape*, 90 Conn. 98, 96 Atl. 313, it is held:

"Liberty of speech and of the press is not license, not lawlessness, but the right to fairly criticize and comment."

See, also, *Ex parte Bird*, 5 Porto Rico, 241.

In *Turner v. Williams*, 194 U. S. 279, 294, 24 Sup. Ct. 719, 724 (48 L. Ed. 979) Mr. Chief Justice Fuller said:

"The flaming brand which guards the realm where no human government is needed still guards the entrance; and as long as human governments endure they cannot be denied the power of self-preservation as that question is presented here."

The act of Congress in question here is one obviously enacted and necessary for the preservation of our government and the enforcement of its rights. In my judgment to deny its constitutionality is to deny to the government of the United States the power of self-preservation by suppressing the publication and distribution of false statements made with the intent to destroy the morale and efficiency of our armies when engaged in lawful warfare, and prevent or interfere with their lawful organization and the lawful recruiting thereof. Such publications give aid and comfort to the enemy.

If a jury on evidence should find that this pamphlet contains false statements calculated to discourage our armies and enlisted men, discourage compliance with our draft laws, and interfere with their enforcement, or impair the morale of

our armies, and that it was the intent of the writer and distributor to bring about such results, can it be justified on the theory that our Constitution warrants and protects the making of such false statements disseminated for such a purpose? I think not. Freedom of speech and of the press does not give liberty to the individual to prevent or interfere with the preservation of our government, or the organization and success of our armies, and this may not be done under the guise of advocating the principles of a political party or the principles of Socialism. In the instant case, the language employed and contained in this pamphlet is for the consideration of the jury, and it will be for the jury to say whether or not the statements made, if proven to be false, were willfully made with intent to interfere with the operation or success of our military or naval forces, or to promote the success of our enemies, or willfully attempt to cause insubordination, or refusal of duty in such forces of the United States. * * *

I find no ground for sustaining the demurrer to the indictment or to any count thereof, and same is overruled.⁴²

⁴² See, also, *Goldstein v. United States*, 258 Fed. 908, 169 C. C. A. 628, holding a motion picture film, called "The Spirit of '76" and which depicted outrages by the British soldiers upon the Americans, a violation of the Espionage Act, in that it represented an attempt to obstruct recruiting, cause mutiny, etc.

By title 12, § 2, of the Espionage Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 10401b), authority is given to the Postmaster General to exclude from the mails literature which violates this act. This provision of the act was held constitutional in *Masses Pub. Co. v. Patten*, 246 Fed. 24, 158 C. C. A. 250, L. R. A. 1918C, 79. The court said: "The act of Congress now called in question does not undertake to say that certain matter shall not be published, nor that it shall not be transmitted in interstate commerce. It simply declares that such matter shall not be carried in the United States mails."

May 16, 1918 (40 Stat. 553, c. 75), the act of 1917 was amended (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 10212c), by adding provisions bringing within the condemnation of the act those who should "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the uniform of the Army or Navy, of the United States into contempt, scorn, contumely, or disrepute, or shall willfully utter, print, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall willfully display the flag of any foreign enemy, or shall willfully, by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products necessary or essential to the prosecu-

ABRAMS v. UNITED STATES.

(Supreme Court of the United States, 1919. 250 U. S. 616, 40 Sup. Ct. 17, 63 L. Ed. 1173.)

Mr. Justice CLARKE delivered the opinion of the court.

On a single indictment, containing four counts, the five plaintiffs in error, hereinafter designated the defendants, were convicted of conspiring to violate provisions of the Espionage Act of Congress (section 3, title I, of Act June 15, 1917, c. 30, 40 Stat. 219, as amended by Act May 16, 1918, c. 75, 40 Stat. 553 [Comp. St. 1918, § 10212c]).

Each of the first three counts charged the defendants with conspiring, when the United States was at war with the Im-

tion of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, and whoever shall willfully advocate, teach, defend or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished. * * *

For similar state legislation, see Laws Minn. 1917, c. 463, § 1 (Gen. St. Supp. 1917, § 8521—1). In the case of *State v. Holm*, 139 Minn. 267, 166 N. W. 181, L. R. A. 1918C, 304 (1918), Holm was prosecuted under this act for publishing a pamphlet asserting that "this war was arbitrarily declared against the will of the people," that "the people are ten to one against it," that "the President and Congress have forced this war upon the United States," that "the integrity of the country is being menaced," and then asking: "Why should the entire population be called upon to suffer and die because a few individuals have invested surplus wealth unwisely? Are you ready to give your life to save their dollars?" The conviction of the defendant was sustained. The constitutionality of the act was upheld on the ground that the state may make it a penal offense to advocate measures inimical to the public welfare.

It is interesting to compare the provisions of the war-time seditious libel amendment to the Espionage Act with the Sedition Act of 1798. The early act (1 Stat. 596) is as follows:

Section 1. Be it enacted by the Senate and House of Representatives of the United States, in Congress assembled, that if any persons shall unlawfully combine or conspire together, with intent to oppose any measure or measures of the government of the United States, which are or shall be directed by proper authority, or to impede the operation of any law of the United States, or to intimidate or prevent any person holding a place or office in or under the government of the United States, from undertaking, performing or executing his trust or duty; and if any person or persons, with intent as aforesaid, shall counsel, advise or attempt to procure any insurrection, riot, unlawful assembly or combination, whether such conspiracy, threatening, counsel, advice, or attempt shall have the proposed effect or not, he or they shall be deemed guilty of high misdemeanor, and on conviction, before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding five thousand dollars, and by imprisonment during a term not less

perial Government of Germany, to unlawfully utter, print, write and publish: In the first count, "disloyal, scurrilous and abusive language about the form of government of the United States;" in the second count, language "intended to bring the form of government of the United States into contempt, scorn, contumely, and disrepute;" and in the third count, language "intended to incite, provoke and encourage resistance to the United States in said war." The charge in the fourth count was that the defendants conspired "when the United States was at war with the Imperial German Government, * * * unlawfully and willfully, by utterance, writing, printing and publication to urge, incite and advocate curtailment of production of things and products, to wit, ord-

than six months nor exceeding five years; and further, at the discretion of the court may be holden to find sureties for his good behavior in such sum, and for such time, as the said court may direct.

Sec. 2. And be it further enacted, that if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

Sec. 3. And be it further enacted and declared, that if any person shall be prosecuted under this act, for writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

Sec. 4. And be it further enacted, that this act shall continue and be in force until the third day of March, one thousand eight hundred and one, and no longer: Provided, that the expiration of the act shall not defeat a prosecution and punishment of any offence against the law, during the time it shall be in force.

Approved July 14, 1798.

For war-time restrictions upon the foreign language press, see U. S. Comp. St. 1918, § 3115½j. Act Oct. 6, 1917, c. 106, § 19, 40 Stat. 425.

The following extracts, taken from recent popular writings, deal

nance and ammunition, necessary and essential to the prosecution of the war." The offenses were charged in the language of the act of Congress.

It was charged in each count of the indictment that it was a part of the conspiracy that the defendants would attempt to accomplish their unlawful purpose by printing, writing and distributing in the city of New York many copies of a leaflet or circular, printed in the English language, and of another printed in the Yiddish language, copies of which, properly identified, were attached to the indictment.

All of the five defendants were born in Russia. They were intelligent, had considerable schooling, and at the time they were arrested they had lived in the United States terms varying from five to ten years, but none of them had applied for naturalization. Four of them testified as witnesses in

with the questions of policy involved in the legislation with reference to seditious utterances:

"The peril resulting to the national cause from tolerance of adverse opinion is largely imaginary; in any event, it is slight as compared with the permanent danger of intolerance to free institutions. * * * Toleration of adverse opinion is not a matter of generosity, but of political prudence." These statements were made in criticism of the Espionage Act and by way of comment on the Debs Case (Debs v. United States, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566), by Ernst Freund in the New Republic, May 3, 1919.

"The normal criminal law is willing to run risks for the sake of open discussion, believing that truth will prevail over falsehood if both are given a fair field, and that argument and counter argument are the best methods which man has devised for ascertaining the right course of action for individuals or a nation. It holds that error is its own cure in the end, and the worse the error, the sooner it will be rejected. Attorney General Gregory has defended the Espionage Act on the ground that propaganda is especially dangerous in a country governed by public opinion. I believe this to be wholly wrong. Free discussion will expose the lies and fallacies of propaganda, while in a country where opinion is suppressed propaganda finds subterranean channels, where it cannot be attacked by its opponents." Zechariah Chafee, Jr., 19 New Republic, 381 (July 23, 1919).

"If we have taken reasonable precautions against violence, we should not be disappointed at not securing absolute unanimity among our population on political and economic matters. If Americanism means anything concrete, it certainly means tolerance for opinions widely different from our own, however objectionable they seem to us. Such is the tradition handed down to us by Roger Williams and Thomas Jefferson. We must legislate against the use of force, and protect ourselves against anarchy by the strength of argument and a confidence in American institutions, including that most characteristic of all, which stands at the head of the Bill of Rights, freedom of thought." Zechariah Chafee, Jr., 19 New Republic, 384, 385 (July 23, 1919).

"The limitation of the punishment of speech to direct provocation to crime is the essential element of the freedom of the press." Zechariah Chafee, Jr., 19 New Republic, 381 (July 23, 1919).

their own behalf, and of these three frankly avowed that they were "rebels," "revolutionists," "anarchists," that they did not believe in government in any form, and they declared that they had no interest whatever in the government of the United States. The fourth defendant testified that he was a "Socialist" and believed in "a proper kind of government, not capitalistic," but in his classification the government of the United States was "capitalistic."

It was admitted on the trial that the defendants had united to print and distribute the described circulars and that 5,000 of them had been printed and distributed about the 22d day of August, 1918. The group had a meeting place in New York City, in rooms rented by defendant Abrams, under an assumed name, and there the subject of printing the circulars was discussed about two weeks before the defendants were arrested. The defendant Abrams, although not a printer, on July 27, 1918, purchased the printing outfit with which the circulars were printed, and installed it in a basement room where the work was done at night. The circulars were distributed, some by throwing them from a window of a building where one of the defendants was employed and others secretly, in New York City.

The defendants pleaded "not guilty," and the case of the government consisted in showing the facts we have stated, and in introducing in evidence copies of the two printed circulars attached to the indictment, a sheet entitled "Revolutionists Unite for Action," written by the defendant Lipman, and found on him when he was arrested, and another paper, found at the headquarters of the group, and for which Abrams assumed responsibility.

Thus the conspiracy and the doing of the overt acts charged were largely admitted and were fully established.

On the record thus described it is argued, somewhat faintly, that the acts charged against the defendants were not unlawful because within the protection of that freedom of speech and of the press which is guaranteed by the First Amendment to the Constitution of the United States, and that the entire Espionage Act is unconstitutional because in conflict with that amendment.

This contention is sufficiently discussed and is definitely negated in *Schenck v. United States* and *Baer v. United States*, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470, and in *Frohwerk v. United States*, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561.

The claim chiefly elaborated upon by the defendants in the oral argument and in their brief is that there is no substantial evidence in the record to support the judgment upon the ver-

dict of guilty and that the motion of the defendants for an instructed verdict in their favor was erroneously denied. A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict. *Troxell, Administrator, v. Delaware, Lackawanna & Western R. R. Co.*, 227 U. S. 434, 442, 33 Sup. Ct. 274, 57 L. Ed. 586; *Lancaster v. Collins*, 115 U. S. 222, 225, 6 Sup. Ct. 33, 29 L. Ed. 373; *Chicago & North Western Ry. Co. v. Ohle*, 117 U. S. 123, 129, 6 Sup. Ct. 632, 29 L. Ed. 837. We shall not need to consider the sufficiency, under the rule just stated, of the evidence introduced as to all of the counts of the indictment, for, since the sentence imposed did not exceed that which might lawfully have been imposed under any single count, the judgment upon the verdict of the jury must be affirmed if the evidence is sufficient to sustain any one of the counts. *Evans v. United States*, 153 U. S. 608, 14 Sup. Ct. 939, 38 L. Ed. 839; *Claassen v. United States*, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; *Debs v. United States*, 249 U. S. 211, 216, 39 Sup. Ct. 252, 63 L. Ed. 566.

The first of the two articles attached to the indictment is conspicuously headed, "The Hypocrisy of the United States and her Allies." After denouncing President Wilson as a hypocrite and a coward because troops were sent into Russia, it proceeds to assail our government in general, saying:

"His [the President's] shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity."

It continues:

"He [the President] is too much of a coward to come out openly and say: 'We capitalistic nations cannot afford to have a proletarian republic in Russia.'"

Among the capitalistic nations Abrams testified the United States was included.

Growing more inflammatory as it proceeds, the circular culminates in:

"The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine!"

"Yes friends, there is only one enemy of the workers of the world and that is CAPITALISM."

This is clearly an appeal to the "workers" of this country to arise and put down by force the government of the United States which they characterize as their "hypocritical," "cowardly" and "capitalistic" enemy.

It concludes:

"Awake! Awake, you Workers of the World! REVOLUTIONISTS."

The second of the articles was printed in the Yiddish language and in the translation is headed, "Workers—Wake Up." After referring to "his Majesty, Mr. Wilson, and the rest of the gang, dogs of all colors!" it continues:

"Workers, Russian emigrants, you who had the least belief in the honesty of *our* government,"

—which defendants admitted referred to the United States government—

"must now throw away all confidence, must spit in the face of the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war."

The purpose of this obviously was to persuade the persons to whom it was addressed to turn a deaf ear to patriotic appeals in behalf of the government of the United States, and to cease to render it assistance in the prosecution of the war.

It goes on:

"With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans, but also for the Workers Soviets of Russia. *Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.*"

It will not do to say, as is now argued, that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid government loans and not to work in ammunition factories, where their work would produce "bullets, bayonets, cannon" and other munitions of war, the use of which would cause the "murder" of Germans and Russians.

Again, the spirit becomes more bitter as it proceeds to declare that—

"America and her Allies have betrayed [the Workers]. Their robberish aims are clear to all men. The destruction of the Russian Revolution, that is the politics of the march to Russia.

"Workers, our reply to the barbaric intervention has to be a general strike! An open challenge only will let the government know that not only the Russian Worker fights for freedom, but also here in America lives the spirit of Revolution."

This is not an attempt to bring about a change of administration by candid discussion, for no matter what may have incited the outbreak on the part of the defendant anarchists, the manifest purpose of such a publication was to create an attempt to defeat the war plans of the government of the United States, by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war.

This purpose is emphasized in the next paragraph, which reads:

"Do not let the government scare you with their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. Workers, up to fight."

After more of the same kind, the circular concludes:

"Woe unto those who will be in the way of progress. Let solidarity live!"

It is signed, "The Rebels."

That the interpretation we have put upon these articles, circulated in the greatest part of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind were at the time being manufactured for transportation overseas, is not only the fair interpretation of them, but that it is the meaning which their authors consciously intended should be conveyed by them to others is further shown by the additional writings found in the meeting place of the defendant group and on the person of one of them. One of these circulars is headed: "Revolutionists! Unite for Action!"

After denouncing the President as "Our Kaiser" and the hypocrisy of the United States and her Allies, this article concludes:

"Socialists, Anarchists, Industrial Workers of the World, Socialists, Labor party men and other revolutionary organizations Unite for Action and let us save the Workers' Republic of Russia!"

"Know you lovers of freedom that in order to save the Russian revolution, we must keep the armies of the allied countries busy at home."

Thus was again avowed the purpose to throw the country into a state of revolution, if possible, and to thereby frustrate the military program of the government.

The remaining article, after denouncing the President for

what is characterized as hostility to the Russian revolution, continues:

"We, the toilers of America, who believe in real liberty, shall *pledge ourselves*, in case the United States will participate in that bloody conspiracy against Russia, *to create so great a disturbance that the autocrats of America shall be compelled to keep their armies at home, and not be able to spare any for Russia.*"

It concludes with this definite threat of armed rebellion:

"If they will use arms against the Russian people to enforce their standard of order, *so will we use arms*, and they shall never see the ruin of the Russian Revolution."

These excerpts sufficiently show, that while the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the government in Europe. A technical distinction may perhaps be taken between disloyal and abusive language applied to the *form* of our government or language intended to bring the *form* of our government into contempt and disrepute, and language of like character and intended to produce like results directed against the President and Congress, the agencies through which that form of government must function in time of war. But it is not necessary to a decision of this case to consider whether such distinction is vital or merely formal, for the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war, as the third count runs, and, the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war as is charged in the fourth count. Thus it is clear not only that some evidence but that much persuasive evidence was before the jury tending to prove that the defendants were guilty as charged in both the third and fourth counts of the indictment and under the long established rule of law hereinbefore stated the judgment of the District Court must be

Affirmed.

Mr. Justice HOLMES, dissenting.

This indictment is founded wholly upon the publication of two leaflets which I shall describe in a moment. The first

count charges a conspiracy pending the war with Germany to publish abusive language about the form of government of the United States, laying the preparation and publishing of the first leaflet as overt acts. The second count charges a conspiracy pending the war to publish language intended to bring the form of government into contempt, laying the preparation and publishing of the two leaflets as overt acts. The third count alleges a conspiracy to encourage resistance to the United States in the same war and to attempt to effectuate the purpose by publishing the same leaflets. The fourth count lays a conspiracy to incite curtailment of production of things necessary to the prosecution of the war and to attempt to accomplish it by publishing the second leaflet to which I have referred.

The first of these leaflets says that the President's cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington. It intimates that "German militarism combined with allied capitalism to crush the Russian revolution"—goes on that the tyrants of the world fight each other until they see a common enemy—working class enlightenment, when they combine to crush it; and that now militarism and capitalism combined, though not openly, to crush the Russian revolution. It says that there is only one enemy of the workers of the world and that is capitalism; that it is a crime for workers of America, etc., to fight the workers' republic of Russia, and ends "Awake! Awake, you workers of the world! Revolutionists." A note adds "It is absurd to call us pro-German. We hate and despise German militarism more than do you hypocritical tyrants. We have more reason for denouncing German militarism than has the coward of the White House."

The other leaflet, headed "Workers—Wake Up," with abusive language says that America together with the Allies will march for Russia to help the Czecho-Slovaks in their struggle against the Bolsheviks, and that this time the hypocrites shall not fool the Russian emigrants and friends of Russia in America. It tells the Russian emigrants that they now must spit in the face of the false military propaganda by which their sympathy and help to the prosecution of the war have been called forth and says that with the money they have lent or are going to lend "they will make bullets not only for the Germans but also for the Workers Soviets of Russia," and further, "Workers in the ammunition factories, you are producing bullets, bayonets, cannon to murder not only the Germans, but also your dearest, best, who are in Russia fighting for freedom." It then appeals to the same Russian emigrants at some length not to consent to the "inquisitorial expedition

in Russia," and says that the destruction of the Russian revolution is "the politics of the march on Russia." The leaflet winds up by saying "Workers, our reply to this barbaric intervention has to be a general strike!" And after a few words on the spirit of revolution, exhortations not to be afraid, and some usual tall talk ends "Woe unto those who will be in the way of progress. Let solidarity live! The Rebels."

No argument seems to be necessary to show that these pronunciamientos in no way attack the form of government of the United States, or that they do not support either of the first two counts. What little I have to say about the third count may be postponed until I have considered the fourth. With regard to that it seems too plain to be denied that the suggestion to workers in the ammunition factories that they are producing bullets to murder their dearest, and the further advocacy of a general strike, both in the second leaflet, do urge curtailment of production of things necessary to the prosecution of the war within the meaning of the Act of May 16, 1918, c. 75, 40 Stat. 553, amending section 3 of the earlier Act of 1917 (Comp. St. § 10212c). But to make the conduct criminal that statute requires that it should be "with intent by such curtailment to cripple or hinder the United States in the prosecution of the war." It seems to me that no such intent is proved.

I am aware of course that the word "intent" as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered

and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime. I admit that my illustration does not answer all that might be said but it is enough to show what I think and to let me pass to a more important aspect of the case. I refer to the First Amendment to the Constitution that Congress shall make no law abridging the freedom of speech.

I never have seen any reason to doubt that the questions of law that alone were before this court in the Cases of Schenck (249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470) Frohwerk (249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561), and Debs (249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566), were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet if published for the purposes alleged in the fourth count might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. An actual intent in the sense that I have explained is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime, for reasons given in *Swift & Co. v. United States*, 196 U. S. 375, 396, 25 Sup. Ct. 276, 49 L. Ed. 518. It is necessary where the success of the attempt depends upon others because if that intent is not present the actor's aim may be accomplished without bringing about the evils sought to be checked. An intent to prevent interference with the revolution in Russia might have

been satisfied without any hindrance to carrying on the war in which we were engaged.

I do not see how anyone can find the intent required by the statute in any of the defendant's words. The second leaflet is the only one that affords even a foundation for the charge, and there, without invoking the hatred of German militarism expressed in the former one, it is evident from the beginning to the end that the only object of the paper is to help Russia and stop American intervention there against the popular government—not to impede the United States in the war that it was carrying on. To say that two phrases taken literally might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems to me by no means enough to show an attempt to produce that effect.

I return for a moment to the third count. That charges an intent to provoke resistance to the United States in its war with Germany. Taking the clause in the statute that deals with that in connection with the other elaborate provisions of the act, I think that resistance to the United States means some forcible act of opposition to some proceeding of the United States in pursuance of the war. I think the intent must be the specific intent that I have described and for the reasons that I have given I think that no such intent was proved or existed in fact. I also think that there is no hint at resistance to the United States as I construe the phrase.

In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, even if what I think the necessary intent were shown; the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow—a creed that I believe to be the creed of ignorance and immaturity when honestly held, as I see no reason to doubt that it was held here, but which, although made the subject of examination at the trial, no one has a right even to consider in dealing with the charges before the court.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that

you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 (Act July 14, 1798, c. 73, 1 Stat. 596), by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law abridging the freedom of speech." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.

Mr. Justice BRANDEIS concurs with the foregoing opinion.⁴³

⁴³ It should be noted that the verdict against the defendants was sustained particularly upon the third and fourth counts of the indictment, which alleged attempts to cause the readers of the pamphlets to disobey the laws of the United States and to cause them to limit the production of munitions of war by striking, with the intent to hinder the government in the prosecution of the war with Germany, and that scant attention was given to the first and second counts which charged the defendants with using profane and scurrilous language about the form of government and language calculated to bring it into hatred and contempt. As to the matters involved in counts 1 and 2 Judge Holmes' counsel of conservatism is especially forceful. The argument upon which he would reverse the case, how-

SECTION 3.—BLASPHEMOUS WRITINGS

REG. v. RAMSAY and FOOTE.

(Queen's Bench Division, *Nisi Prius*, 1883. 48 Lt. 733, 15 Cox, C. C. 231.)

This was an indictment against Foote, the reputed editor, and Ramsay, the reputed publisher, of a newspaper styled the *Freethinker*, for the publication of certain blasphemous libels therein. * * *

Lord COLERIDGE, C. J.⁴⁴ * * * The statement of the law by Mr. Starkie has again and again been assented to by judges as a correct statement of the existing law. I will read it to you, therefore, as expressing what I lay down to you as law in words far better than any at my command.

"There are no questions of more intense and awful interest than those which concern the relations between the Creator and the beings of His creation; and though, as a matter of discretion and prudence, it might be better to leave the discussion of such matters to those who, from their education and habits, are most likely to form correct conclusions, yet it cannot be doubted that any man has a right, not merely to judge for himself on such subjects, but also, legally speaking, to publish his opinions for the benefit of others. When learned and acute men enter upon these discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken, so far from producing mischief, must in general tend to the advancement of truth, and the establishment of religion on the firmest and most stable foundations. The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind, are usually so gross as to render his errors harmless; but be this as it may, the law interferes not with his blunders so long as they are honest ones, justly considering that society is more than compensated for the partial and limited mischief which may rise from the mistaken endeavors of honest ignorance, by the splendid advantages which result to religion and to truth from the exertions of free and unfettered minds. It is the mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of man-

ever, seems doubtful. For a criticism of his argument for reversal, see *The Review*, Dec. 6, 1919, p. 636.

⁴⁴ Part of the statement of facts and parts of the opinion are omitted.

kind. A willful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by willful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals—a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong.”

Now that I believe to be a correct statement of the law. Whether it ought to be or not is not for me to say. I tell you the law as I understand it, leaving you to apply it to the facts of the particular case before you. There was much force, no doubt, in the way in which Mr. Foote dealt with the passage in his address to you. The vagueness, the uncertainty which he insisted upon are possibly, however, inherent in the subject, and there is perhaps more to be said in favor of Mr. Starkie's view than may appear without reflection. There is a passage in his book taken, I believe, from Michaelis, in which it is pointed out with great truth that in one view the law against blasphemous libel may be for the benefit of the libeller himself, who, if there were no law, might find its absence ill exchanged for the presence of popular vengeance and indignation.

“Now to the man who from his heart believes his religion, and regards it as the way to eternal bliss, and as the comfort both of life and death, and who of course wishes to educate his family in the knowledge and belief of it, nothing can be more offensive than to hear another speaking against it, and employing, not arguments (although even these he might let alone, because every man has a right even to err, without our forcibly interfering to rid him of his errors), but insolent and contemptuous language, and blaspheming its gods, its prophets, saints, and sacred things. Were the religion in question only tolerated, still the state is bound to protect every person who believes it from such outrages, or it cannot blame him if he has not the patience to bear them. But if it be the established national religion, and of course the person not believing it be only tolerated by the state, and though he enjoys its protection just as if he were in a strange house, such an outrage is excessively gross; and unless we conceive the people so tame as to put up with any affront; and of course likely to play but a very despicable part on the stage of the world, the state has only to choose between the two alternatives, of either punishing the blasphemer himself or else leaving him to the fury of the people. The former is the milder plan, and, therefore, to be preferred, because the people are

apt to gratify their vengeance without sufficient inquiry, and of course it may light upon the innocent. Nor is this by any means the treatment which I only claim for the religion which I hold to be the true one, I am also bound to admit it when I happen to be among a people from whose religion I dissent; were I in a Catholic country to deride their saints or insult their religion by my behavior were it only by rudely and designedly putting on my hat when decency would have suggested the taking it off; or were I in Turkey to blaspheme Mahomet, or in a heathen city its gods, nothing would be more natural than for the people, instead of suffering it, to avenge the insult in their usual way, that is, tumultuously, passionately, and immoderately; or else the state would, in order to secure me from the effects of their fury, be under the necessity of taking my punishment upon itself, and if it does so, it does a favor both to me and other dissenters from the established religion, because it secures us from still greater evils."

It is not so clear, therefore, that some sort of protection for the constituted religion of the country is not a good thing, even for those who differ from it; for, if there were no such protection, the consequences pointed out by Michaelis might too probably ensue. It does not follow that because the objects of popular dislike differ in different ages; it does not follow (I wish it did) that the populace of our age are much wiser than the populace of earlier times. It is not so very long ago in our history since the populace of Birmingham wrecked the house, and burnt the library of Dr. Priestley, a true philosopher, and an excellent man. It was not the state, it was the populace. And it is therefore not so clear to my mind that some sort of blasphemy laws reasonably enforced may not be an advantage, even to those who differ from the popular religion of the country, and who desire to oppose and to deny it. Further, therefore, it must not be taken as so absolutely certain that all these laws against blasphemy are in principle tyrannical. Whether however, they are so or not, if they exist we must administer them, and the principle upon which we are to administer them is to be found in the passage I have read from Starkie. But I think I ought to go further, and to say that such study as I have been able to make of the cases has not satisfied me that the law ever was laid down differently. * * *

If the law, as I have laid it down to you is correct—and I believe it has always been so—if the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel. There are many great and grave writers, who have attacked

the foundations of Christianity. Mr. Mill undoubtedly did so; some great writers now alive have done so too; but no one can read their writings without seeing a difference between them and the incriminated publications, which I am obliged to say is a difference not of degree but of kind. There is a grave, an earnest, a reverent, I am almost tempted to say, a religious tone in the very attacks on Christianity itself, which shows that what is aimed at is not insult to the opinions of the majority of Christians, but a real, quiet, honest pursuit of truth. If the truth at which these writers have arrived is not the truth we have been taught, and which, if we had not been taught it, we might have discovered, yet because these conclusions differ from ours, they are not to be exposed to a criminal indictment. With regard to many of these persons therefore, I should say they were within the protection of the law as I understand it. * * * I think it * * * a good law that persons should be obliged to respect the feelings and opinions of those amongst whom they live. I assent to the passage from Michaelis, that in a Catholic country we have no right to insult Catholic opinion, nor in a Mohammedan country, have we any right to insult Mohammedan opinion. I differ from both, but I am bound as a good citizen to treat with respect opinions with which I do not agree.

Take these publications with you; look at them; if you think they are permissible attacks on the religion of the country you will find the defendants not guilty. Take these cartoons. Mr. Foote says they are not attacks upon, and are not intended for caricatures of, Almighty God. If there be such a Being, says Mr. Foote, he can have no feeling for Almighty God but profound reverence and awe, but this he says in his mode of holding up to contempt what he calls a caricature of that ineffable Being as delineated in the Hebrew Scriptures. That is for you to try. Look at them, and judge for yourselves whether they do or do not come within the widest limits of the law. If they do, then as with the libels find the defendants not guilty. But if you think that they do not come within the most liberal and largest view that anyone can give of the law as it exists now, then find them guilty. Whatever may be the consequences—you may think the prosecution unwise, you may think the law undesirable, you may think no publications of this sort should ever be made the subject of a criminal attack (I do not say you do think so, but you may), it matters not—your duty is to obey the law; not to strain it in favor of the defendants because you do not like the prosecution; not to strain it against them because you do not yourselves agree with the statements they advocate,

as you are certain entirely to disapprove of the manner in which they advocate them. Take all these alleged libels into your consideration and say whether you find Mr. Foote or Mr. Ramsay, both or either, guilty or not guilty of this publication.

The jury then retired, and upon an intimation being received from them that they were not likely to come to an unanimous verdict, Lord Coleridge, C. J., intimated to Sir Hardings Giffard that it was unusual to continue a trial when "another conviction had been obtained against a defendant for substantially the same sort of thing," and in addition, that the prosecution would be called upon to decide without delay upon the course to be adopted under the circumstances.

The jury did not agree upon a verdict, and on Tuesday, May 1, the Attorney General issued his fiat for a *nolle prosequi*⁴⁵ [i. e., a dismissal of the prosecution].

SECTION 4.—MISCELLANEOUS STATUTES

A. PUBLICATIONS DEVOTED PRINCIPALLY TO STORIES OF LUST AND CRIME

STATE v. McKEE.

(Supreme Court of Errors of Connecticut, 1900. 73 Conn. 18, 46 Atl. 409, 49 L. R. A. 542, 84 Am. St. Rep. 124.)

Information for selling a newspaper devoted to and principally made up of criminal news, police reports, pictures and stories of bloodshed, lust, and crime, brought to the superior court in New Haven county and tried to the jury before Rora-

⁴⁵ "It is, indeed, still blasphemy, punishable at common law, scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith, and no one would be allowed to give or to claim any pecuniary encouragement for such purpose; yet any man may, without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it." *Shore v. Wilson*, 9 Clark & F. 355, at pages 524, 525 (1839).

"And it is now, we think, generally conceded that the law laid down in *Shore v. Wilson* and *Reg. v. Ramsay and Foote* is 'the better opinion' in point of law, and we have stated it at the beginning of this chapter as the existing law of blasphemy." *Odgers, Libel and Slander* (5th Ed.) p. 503.

See, also, *The Law of Blasphemy*, 16 Mich. Law Rev. 149, by R. W. Lee. The article discusses and approves *Bowman v. The Secular Society, Limited*, [1917] App. Cas. 406, which accepts Lord Coleridge's statement of the law in *Reg. v. Ramsay and Foote*, 15 Cox, C. C. 231,

back, J. Verdict and judgment of guilty and appeal by the accused for alleged errors in the rulings and charge of the court. Error, and new trial granted.

The information charged that "John A. McKee," etc., "on the 3d day of September, A. D. 1899, unlawfully did sell to Phillip Lautenbach, offer, and have in his possession with intent to sell and offer, a certain paper devoted to the publication and principally made up of criminal news, police reports, pictures and stories of deeds of bloodshed, lust, and crime, which said paper then consisted of twelve pages; and at the top or head of the first of said pages were printed the words and figures following, to wit: 'Waterbury Herald. Vol. 11, No. 602. Waterbury, Conn. Sept. 3, 1899. Price, five cents;' and at the top or head of each succeeding page of said paper were printed the words and figures following, to wit, 'Sunday Herald, Sept. 3, 1899;' against the peace," etc. The information contained three other counts, each charging the sale on a different date of a different issue of the same paper. The defendant demurred to the complaint. The demurrer was overruled.

The finding of the court (Roraback, J.) shows that upon the trial the state's attorney offered in evidence a copy of the paper described in each count. The court, upon objection by the accused, ruled that the papers were admissible, as tending to prove the charge in the information, and that they should go to the jury. The defendant excepted. The papers so admitted are marked as exhibits, and appear in the record. By agreement, the state's attorney and attorney for accused marked the articles to which they desired to call attention as supporting their respective claims. The defendant presented in writing requests to charge in the form of an extended and argumentative charge. The court, declined to charge as requested. The charge as given contained the following passages:

"First. In my opinion, gentlemen, the law upon which this prosecution is brought is a constitutional and valid one; but, under the limitations already stated, you are the judges of the law as well as of the facts, and it is for you to say on all the evidence, and under the law as you find it to be, and as you conscientiously believe it to be, whether the accused is guilty or not guilty of the crime charged against him. The statute upon which this prosecution is based reads as follows: 'Every person who shall sell, lend, give, or offer, or have in his

as correct. See, further, *People v. Ruggles*, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335 (1811); *Com. v. Kneeland*, 20 Pick. (Mass.) 206 (1838); *Cooley Constitutional Limitations* (7th Ed.) p. 672. Blasphemy is defined by statute in a number of states.

possession with intent to sell, transport, lend, give, or offer any book, magazine, pamphlet, or paper devoted to the publication or principally made up of criminal news, police reports, or pictures and stories of deeds of bloodshed, lust, or crime, shall be punished,' etc.⁴⁶ As I have stated to you, this statute, in my opinion, is constitutional, and a valid police regulation.

"Second. A paper comes within the description of the offense alleged in the information, and also within the prohibition of the statute, if it is devoted to, or principally made up of, either criminal news, or police reports, or pictures and stories of deeds of bloodshed, or pictures and stories of lust, or pictures and stories of crime. 'Criminal news,' within the intendment of the statute, means reports and articles concerning, relating to, and setting forth acts or conduct involving criminal wrongdoing. 'Police reports,' within the intendment of the statute, means articles and statements concerning the doings of the police in the detection, arrest, or prosecution of criminals. 'Pictures and stories of deeds of bloodshed,' within the intendment of the statute, means recitals or narratives, either true, false, or fictitious, or of or relating to or involving deeds concerning the shedding of human blood, such as assaults, murder, manslaughter, and the like, and accompanied by representations of persons, forms, or scenes connected with, depicting, or portraying such stories.

"Third. The statute provides that the paper must be devoted to, or principally made up of, the news, reports, or pictures and stories mentioned in the statute. 'Devoted to the publication of' the matters in question, within the intendment of the statute, means that such matters are conspicuously and with especial prominence set forth and displayed therein.

⁴⁶ The following states have similar statutes: *Connecticut*, Gen. St. § 1326 (penalty, not over 2 years' imprisonment, or fine of \$1,000, or both); *Illinois*, Rev. St. 1919, c. 38, § 42he (also providing in section 42hg that it is unlawful to employ a minor child to sell such publication); *Indiana*, Burns' Ann. St. 1914, § 2361; *Kansas*, Gen. St. § 3678 (felony, 2 to 5 years' imprisonment); *Kentucky*, Carroll's St. §§ 1351 and 1353; *Maryland*, 3 Code Pub. Gen. Laws, art. 27, § 373; *Minnesota*, Gen. St. 1913, § 8705; *Missouri*, Rev. St. 1909, § 4730; *New Hampshire*, Pub. St. 1901, c. 265, §§ 6 and 7; *New York*, Penal Law (Consol. Laws, c. 40) § 1141 (2); *North Dakota*, Comp. Laws 1913, §§ 9652-9654; *Ohio*, Page & Ad. Gen. Code, § 13035; *Oregon*, L. O. L. § 2094, amended Laws 1917, c. 88; *Pennsylvania*, Purdon's Dig. (13th Ed.) p. 989, § 370; *Texas*, Vernon's Ann. Pen. Code 1916, art. 509; *Maryland*, 3 Code Pub. Gen. Laws, § 373 (limits the offense to the sale, loan, or gift of such books or papers to minors). For similar provisions for the protection of minors, see *Iowa*, Code, § 4955; *Massachusetts*, Rev. Laws, c. 212, § 21; *Missouri*, Rev. St. 1909, § 4732; *Minnesota*, Gen. St. 1913, § 8705; *Montana*, Rev. Codes 1907, § 8391; *Pennsylvania*, Purdon's Dig. (13th Ed.) p. 989, § 367.

'Principally made up of' the matters in question, within the intendment of the statute, means that the matters in question shall appear in the paper in such quantity, prominence, and arrangement as to form or become a leading feature or characteristic of such paper. The words 'devoted to the publication of,' or the words 'principally made up of,' taken separately or together, do not necessarily imply or mean that any certain percentage of the space or that the entire paper shall be filled or occupied with the matter in question. These words and phrases do imply that their prohibited matter shall be a prominent and leading characteristic or feature of the publication; that special attention shall be devoted to the publication of the prohibited items. It is a question for the jury to determine whether or not these papers, or any of them, offered in evidence in support of the information, are devoted to the publication or principally made up of criminal news, police reports, or pictures and stories of deeds of bloodshed, lust, or crime, within the rules already stated to you. It is also a question of fact for the jury to determine, upon all the evidence in the case, whether the accused or his agent, under the rules given, on or about the days alleged in the information, sold or offered, or had in his possession with intent to sell or offer, said papers, or any of them, as charged in the several counts of the information.

"Fourth. In your deliberations you will carefully examine each paper in evidence with the count based thereon, and determine as a matter of fact whether or not these papers, or any of them, come within the definition and prohibition of the statute in question."

The appeal assigns error (1) in overruling the demurrer; (2) in refusing to charge as requested; (3) in the charge as given in each of the four passages above quoted; (4) in admitting in evidence the whole paper described in each of the counts.

HAMERSLEY, J.⁴⁷ The demurrer to the complaint was properly overruled. The only reasons specified in the demurrer that call for notice are these: "(3) Because it [the act of 1895, on which the prosecution was brought] restricts the constitutional right to publish the truth; (4) because it is not alleged that the matter is obscene, blasphemous, scandalous, or libelous."

There is no constitutional right to publish every fact or statement that may be true. Even the right to publish accurate reports of judicial proceedings is limited. The substance of the rule is briefly stated by Judge Cooley in his work on

⁴⁷ Parts of the opinion are omitted.

Constitutional Limitations: "If the nature of the case is such as to make it improper that the proceedings should be spread before the public, because of their immoral tendency, or of the blasphemous or indecent character of the evidence exhibited, the publication, though impartial and full, will be a public offense, and punishable accordingly." *Cooley*, *Const. Lim.* p. 449. This rule applies with a far wider range to ordinary matters.

If the fourth specification implies a claim that the power of the state to punish acts as injurious to the public health, safety, or morals is limited to acts within the adjudicated scope of the common-law offenses of nuisance and libel, it is unfounded. These elastic common-law crimes are based on the broad principle that conduct injurious to public health, safety, and morals may be restrained and punished by the state, although the same conduct, if harmless, cannot validly be prevented. Though defined by an unwritten law, the crimes in fact, like most common-law rules, depend on legislative authority, and may be restricted or extended by the same power. Upon a prosecution of the common-law offense, the question whether the conduct charged is injurious may be a question of fact for the jury; but there are cases in which the legislature may withdraw from the offenses certain specified acts as not injurious, or may declare certain conduct to be injurious, and make such conduct a statutory offense. When this is done, the injurious nature of the conduct is determined, subject, in some instances, to judicial review by the legislature, and is not a question of fact involved in a prosecution under such statute. *State v. Main*, 69 Conn. 123, 133, 37 Atl. 80, 36 L. R. A. 623; *State v. Cunningham*, 25 Conn. 195, 203.

The definition of the perversion of the press to the injury of public morals as the equivalent of conduct which at common law had been punished upon indictment for libel is inadequate and unsound. It substitutes the effect for the cause. The law of libel, as related to such conduct, rests upon the principle of the power and duty of the state to protect each citizen from malicious injury, and society from attacks upon its safety, as well as from the pollutions of immorality, and is coincident in its range with a large portion of the field covered by that principle, but does not mark its limits. This erroneous view was set forth with much ingenuity and ability in the argument of counsel reported in the comparatively recent case of *In re Rapier*, 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93; but the decision involved a condemnation of the view, although the opinion deals mainly with conclusions, without detailing the reasons, owing, as the court states, to

the death of Mr. Justice Bradley, who had been assigned to vindicate the conclusions. If such an attempt to bottle up a broad principle of free government in the definite results of its past application could be made successful, it would, in effect, seriously narrow the freedom of speech and press as now understood, as well as cripple the state in affording that protection to the individual and the public from wrongful acts which is a necessity to the enjoyment of real freedom. It is therefore immaterial whether or not the conduct described in the statute has heretofore been held to be sufficient to support an indictment at common law for nuisance or libel. The legislature has declared that it does endanger public morals, and this it has the power to do, unless the court can say that such declaration is plainly unfounded.

If the fourth specification simply implies that an information, under the statute, must contain an allegation that the prohibited publications are obscene, etc., it is wholly without merit. But the force of the demurrer is not entirely confined to the specified reasons. If for any reason the statute, or that portion of it under which the accused was prosecuted and punished, is unconstitutional or void, the demurrer should have been sustained. The offense charged in the information is a violation of one of the provisions of section 2 of "An act relating to obscene literature," passed in 1895 (Pub. Acts 1895, p. 558). * * *

In 1895 the various sections of the Revision of 1888 directed against the publication of obscene and immoral literature were amended, and grouped in "An act relating to obscene literature." Pub. Acts 1895, p. 558. The principal alterations relate to punishment. Section 1538, as thus amended, reads: "Every person who shall sell," etc., "any book, magazine, pamphlet, or paper, devoted to the publication or principally made up of criminal news, police reports, or pictures, and stories of deeds of bloodshed, lust, or crime, shall be punished." The offense here described is essentially the same as that described in section 2 of the act of 1885. It may be committed in different ways. One, which is the offense charged in the information, is the selling, or having in possession with intent to sell, a newspaper mainly devoted to detailing recent violations of moral obligations through acts of lawless violence; through conduct induced by lust; through crime; to illustrating such conduct by pictures; to revealing such conduct by stories. It is immaterial whether the paper is devoted to setting forth such immoralities in one or more of the manifestations last above indicated. In either case, the offense is committed. The radical difference between the demoralizing effect of facts stated only as incident to the legiti-

mate purposes of science or literature, and the same facts, separated from their surroundings, and massed for attractive presentations so as to fill the mind of the reader only with the immoralities they suggest, is too patent to need comment. The gist of the offense consists in disseminating by means of the newspaper, which finds its way into families, reaching the young as well as the mature, a selection of immoralities so treated as to excite attention and interest sufficient to command circulation for a paper devoted mainly to the collection of such matters.

We cannot say that the act of 1895, in so far as it defines and punishes this offense, is void, and very clearly it does not violate any constitutional provision relating to the freedom of the press. Article 1 of our constitution contains a statement of certain "essential principles of liberty and free government," which constitute an underlying condition on which the delegation of power to the several governmental agencies is made, and so operate as limitations on the exercise of the sovereign power granted in broad terms to the legislative, as well as to the executive and judicial, departments. *State v. Conlon*, 65 Conn. 478, 489, 33 Atl. 518, 31 I. R. A. 55; *Norwalk St. Ry. Co.'s Appeal*, 69 Conn. 576, 589, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794. Among these, the most important and vital are the right to participate in the exercise of political power, and the right to the free exercise and enjoyment of religious profession and worship, as declared in the first four sections of the article. A corollary to these rights is the right to the free expression of opinion on public measures and men, and on religious tenets and controversy. This corollary is expressly declared in the following two sections of the article, viz.:

"Sec. 5. Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

"Sec. 6. No law shall ever be passed to restrain the liberty of speech or of the press."

The primary meaning of "liberty of the press," as understood at the time our early constitutions were framed, was freedom from any censorship of the press; from "all such previous restraints upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers." *Com. v. Blanding*, 3 Pick. 313. But this fundamental guaranty goes further. It recognizes the free expression of opinion on matters of church or state as essential to the successful operation of free government, and it also recognizes the free expression of

opinion on any subject as essential to a condition of civil liberty. The right to discuss public matters stands, in part, on the necessity of that right to the operation of a government by the people, but, with this exception, the right of every citizen to freely express his sentiments on all subjects stands on the broad principle which supports the equal right of all to exercise gifts of property and faculty in any pursuit in life; in other words, upon the essential principles of civil liberty as recognized by our constitution.

Every citizen has an equal right to use his mental endowments, as well as his property, in any harmless occupation or manner; but he has no right to use them so as to injure his fellow citizens, or to endanger the vital interests of society. Immunity in the mischievous use is as inconsistent with civil liberty as prohibition of the harmless use. Both arise from the equal right of all to protection of law in the enjoyment of individual freedom of action, which is the ultimate fundamental principle. This truth is plainly expressed in the language of sections 3 and 5. The liberty protected is not the right to perpetrate acts of licentiousness, or any act inconsistent with the peace or safety of the state. Freedom of speech and press does not include the abuse of the power of tongue or pen, any more than freedom of other action includes an injurious use of one's occupation, business, or property. In truth, freedom of speech and press, like freedom of other action, is necessarily protected by the first four sections of the article; and sections 5 and 6 are not essential for that purpose, unless so far as they erect an arbitrary bar to any form of censorship of the press.

The general right to disseminate opinions on all subjects was probably specified mainly to emphasize the strong necessity to a free government of criticism of public men and measures. But it is specified as one of the conditions of civil liberty, and, like other conditions of a similar nature, it necessarily involves the protection of those who may suffer from the wrongful exercise of any common right. The idea of immunity from molestation for the harmful use of opinion was perhaps not undreamed of in the convention of 1818, but it certainly was held to be inconsistent with true freedom. It may be significant of the views of the framers of our constitution that a section of article 1 contained in its first draft, which prohibited the molestation of any person for his opinions on any subject whatever, was under consideration of the convention during most of its session, and finally rejected without dissent. *Journal Const. Conv. Conn.* pp. 18, 55, 75.

The notion that the broad guaranty of the common right to free speech and free thought contained in our constitution

is intended to erect a bulwark or supply a place of refuge in behalf of the violators of laws enacted for the protection of society from the contagion of moral diseases belittles the conception of constitutional safeguards, and implies ignorance of the essentials of civil liberty. The act of 1895 is valid in so far as it punishes the offense of which the accused was convicted. * * *

The first passage in the charge to which objection is made is not open to the error assigned. The court correctly charged that the statute, in so far as it created the offense for which the defendant was prosecuted, is a constitutional and valid law. But it did err in telling the jury that they were judges of its constitutionality. The validity of a statute is a question of law, to be settled by the court, and the jury are bound to accept the opinion of the court as the law for the case. *State v. Main*, 69 Conn. 123, 132, 37 Atl. 80, 36 L. R. A. 623.

The second passage objected to could hardly have injured the defendant. It relates to the interpretation of the language of the statute, viz.: "Criminal news, police reports, or pictures and stories of deeds of bloodshed, lust or crime." As we have seen, this language means wicked and immoral acts and conduct, set forth in the form of news; that is, accounts of events of that nature, or in the form of statements of, or articles concerning, the doings of the police in the detection and prosecution of offenses of that nature, or in the form of pictures as well as stories of matters of that nature, i. e. deeds of bloodshed, of lust, or of crime, which is a violation of law involving wicked and immoral acts and conduct. This language designates one class of matter, i. e. wicked and immoral conduct, as manifested in one or more of the forms specified. *Strohm v. People*, 160 Ill. 586, 43 N. E. 622.

The third passage objected to contains material error. The gist of the statutory offense is the massing of these immoralities in one publication for circulation, and demands that the paper shall be mainly or principally devoted to the publication of such material. The law cannot be evaded by intermingling other material, whether for the purpose of evasion, or of securing attention to the main subject-matter, so long as the principal resulting effect is the circulation of this massed immorality; but that main result must appear, or the offense is not committed. The offense does not depend on the motive. It is immaterial whether the motive is the gain to be derived from the circulation, the advertising, or the involuntary contributions of those desirous of escaping publicity, or is simply the gratification of a malicious disposition, or is a genuine conviction of the reforming efficiency of a portrayal of all manifestations of crime and immorality; but the offense

does depend upon the devotion or dedication of the columns of the paper mainly to the publication of the matters designated by the statute. The charge, therefore, in stating that the offense may be committed whenever the objectionable matter is a leading feature of the paper, or special attention is devoted to the publication of the prohibited items, fails to state the full meaning of the statute. It may be doubtful whether such an imperfect statement in this case in fact injured the defendant, but it is possible that it did. * * *

There is error, and a new trial is ordered. In this opinion the other judges concurred.⁴⁸

In re BANKS.

(Supreme Court of Kansas, 1895. 56 Kan. 242, 42 Pac. 693.)

The opinion states the material facts. The opinion of the court was delivered by

ALLEN, J. The petitioner, Jonathan Banks, was arrested on a warrant issued by E. L. Carney, Esq., a justice of the peace of Leavenworth county, on a charge of having sold the Kansas City Sunday Sun, alleged to be a newspaper "devoted largely to the publication of scandals, lechery, assignations, intrigues between men and women, and immoral conduct of persons," in violation of chapter 161 of the Laws of 1891. A preliminary examination was had, and he was required to give bond in the sum of \$500 for his appearance at the next term of the district court, and in default thereof he was confined in the jail of Leavenworth county. From this restraint he asks to be discharged.

It is contended that said chapter 161 is void because in contravention of section 11 of the bill of rights, which reads: "The liberty of the press shall be inviolate, and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right, and in all civil or criminal actions for libel the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends the accused party shall be acquitted." The act under consideration was not passed to prevent the publication of libels, nor to suppress papers indulging in such publications, but to prevent the publication and sale of newspapers especially devoted to the publication of scandals and accounts of lecherous and immoral conduct. Without doubt, a newspaper, the most prominent

⁴⁸ Accord: *Strohm v. People*, 160 Ill. 582, 43 N. E. 622 (act embraces pictures as well as stories); *State v. Van Wye*, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627.

feature of which is items detailing the immoral conduct of individuals, spreading out to public view an unsavory mass of corruption and moral degradation, is calculated to taint the social atmosphere, and, by describing in detail the means resorted to by immoral persons to gratify their propensities, tends especially to corrupt the morals of the young, and lead them into vicious paths and immoral acts. We entertain no doubt that the legislature has power to suppress this class of publications, without in any manner violating the constitutional liberties of the press.

The examining magistrate has found that the copy of the Sun which is filed with the petition in this case fills the description of a newspaper, the publication and sale of which is prohibited by the act. There is abundance in the paper to support this finding. The words "largely devoted" do not necessarily imply that any certain percentage of the columns of the paper shall be filled with the prohibited matter, but they do imply that this shall be a prominent feature of the publication; that special attention shall be devoted to the publication of scandalous items.

There is no force in the contention that the title to the act is defective. The petitioner will be remanded to the custody of the sheriff. All the Justices concurring.

B. OBSCENE LITERATURE

STATUTE—ILLINOIS.

Hurd's Rev. St. 1921, c. 38, § 223: Whoever brings, or causes to be brought into this state, for sale or exhibition, or shall sell or offer to sell, or shall give away, or offer to give away, or have in his possession, with or without intent to sell or give away, any obscene and indecent book, pamphlet, paper, drawing, lithograph, engraving, etc. or shall advertise the same for sale, or write or cause to be written, or print or cause to be printed any circular, handbill, card, book, pamphlet, advertisement, or notice of any kind, * * * (stating how or where such thing can be obtained) or print any such articles shall be confined in the county jail, not more than six months or be fined not less than \$100.00 nor more than \$1,000.00. * * * 49

⁴⁹ Other statutes of similar import are as follows: *Federal*, U. S. Comp. St. § 10485, Rev. St. § 5389, 35 Stat. 1149 (the federal law also makes such matter nonmailable, U. S. Comp. St. § 10381, 36 Stat. 1339); *Alabama*, Code 1907, §§ 7427, 7428; *Arizona*, Pen. Code 1913, § 313; *California*, Pen. Code 1909, § 311; *Colorado*, 1908, Rev. St. 1908, §§ 1777, 1778; *Connecticut*, Gen. St. 1902, § 1325; *Delaware*,

C. MISREPRESENTING CIRCULATION

STATUTE—NEW YORK.

Penal Law (Consol. Laws, c. 40) § 946: "Every proprietor or publisher of any newspaper or periodical who shall willfully or knowingly misrepresent the circulation of such newspaper or publication for the purpose of securing advertising or other patronage shall be deemed guilty of a misdemeanor." ⁵⁰

Rev. Code 1915, § 2231; *Florida*, Comp. Laws 1914, § 3540; *Georgia*, Park's Ann. Pen. Code 1914, vol. 6, § 385; *Idaho*, Rev. Code, § 6840; *Indiana*, Burns' Ann. St. 1914, §§ 2359, 2360 (teachings in regular chartered colleges, the publication of standard medical books, and the practice of regular practitioners of medicine or druggists in their legitimate business are excepted from the prohibitions of the statute); *Iowa*, Code 1897, §§ 4951 and 4952, Code Supp. 1913, § 4952 (excepting, however, medical books, and "possession by artists of models in the necessary line of their art," Code 1897, § 4957); *Kansas*, Gen. St. 1915, §§ 3676, 3677; *Kentucky*, Carroll's St. §§ 1351, 1352, 1354, 1355 (the latter section making an exception of scientific publications); *Louisiana*, Marr's Ann. Rev. St. § 2088; *Maine*, Rev. St. 1903, c. 125, §§ 13 and 15; *Maryland*, 3 Code, Pub. Gen. Laws, art. 27, §§ 371, 372; *Massachusetts*, Rev. Laws 1902, c. 212, § 20; *Michigan*, Comp. Laws 1915, § 15474; *Minnesota*, Gen. St. 1913, § 8705; *Mississippi*, Hemingway's Code 1917, §§ 1025-1026; *Missouri*, Rev. St. 1909, §§ 4737, 4738; *Montana*, Rev. Codes 1907, §§ 8391 and 8393; *Nebraska*, Rev. St. 1913, § 8787; *Nevada*, Rev. Laws 1912, § 6461; *New Hampshire*, Pub. St. 1901, c. 265, §§ 6 and 7; *New York*, Penal Law (Consol. Laws, c. 40) § 1141; *New Jersey*, 2 Comp. St. (1910) p. 1762, § 53; *North Carolina*, Pell's Revisal, § 3731; *North Dakota*, Comp. Laws 1913, §§ 9652-9654; *Ohio*, Page & Ad. Gen. Code, § 13035; *Oklahoma*, Rev. Laws 1910, § 2463; *Oregon*, L. O. L. § 2094, amended Laws 1917, c. 88; *Pennsylvania*, Purdon's Dig (13th Ed.) p. 988, §§ 365-370; *Rhode Island*, Gen. Laws 1909, c. 347, § 13; *South Carolina*, Cr. Code 1912, § 391; *South Dakota*, Comp. Laws 1913, Pen. Code, § 371; *Tennessee*, Thompson's Shannon's Code 1917, § 6770; *Texas*, Vernon's Ann. Pen. Code, 1916, tit. X, art. 508; *Utah*, Comp. Laws 1907, § 4247; *Vermont*, Pub. St. 1906, § 5894; *Virginia*, Code, § 3791; *West Virginia*, Code 1913, § 5316; *Wisconsin*, St. 1913, § 4590; *Wyoming*, Comp. St. 1910, §§ 5911 and 5912; *Washington*, Rem. & Bal. Codes, § 2461: "Every person who shall publish, and every proprietor, manager or editor, who shall permit to be published, in any book, newspaper, magazine or other printed publication circulated wholly or in part in this state—(1) Any detailed account of the commission or attempted commission of the crime of rape, carnal knowledge, seduction, adultery, sodomy, or any other sexual crime, or of the trial of any person charged therewith, or (2) any detailed account of the execution of a person convicted of crime; or (3) any detailed statement of any evidence of indecent, obscene, or immoral acts offered in any trial or proceeding; or (4) any interview with, advertisement for, communication from, or account of the actions of any public prostitute, except upon matter concerning public welfare, shall be guilty of a misdemeanor."

⁵⁰ See, also, *California*, Pen. Code, § 538a; *Kansas*, Gen. St. 1915,

D. LABELING POLITICAL ADVERTISEMENTS AS SUCH

STATUTE—NORTH DAKOTA.

Comp. Laws 1913, § 937: No publisher of a newspaper or other periodical shall insert either in its advertising or reading columns any paid matter which is designed or tends to aid, injure or defeat any candidate or political party, or organization or measure before the people, unless it is stated therein that it is a paid advertisement.⁵¹ No person shall pay the owner, editor, publisher, or agent of any newspaper or other periodical to induce him to editorially advocate or oppose any candidate for nomination or election, and no such owner, editor, publisher, or agent shall accept such payment.⁵²

§§ 3682-3686; *North Dakota*, Comp. Laws 1913, § 9788; *Oklahoma*, Rev. Laws 1910, § 2542 ("any editor or proprietor of any newspaper who willfully publishes in such newspaper as true any statement which he has not good reason to believe to be true, with intent to increase thereby the sales of copies of such paper, is guilty of a misdemeanor"); *Rhode Island*, Gen. Laws 1909, c. 249, § 43; *South Dakota*, Comp. Laws, Pen. Code 1913, § 487 (false statements to increase sales). Even in the absence of statute, it would be a tort to secure advertisements by consciously false statements concerning the extent of the circulation of the paper.

⁵¹ There are similar statutes in the following states: *Florida*, Comp. Laws 1914, § 3841t (must also be signed by the author) and section 3841uu (requiring paper which attacks the personal character of a public official or of a candidate for office to grant an equal amount of space free for reply); *Kansas*, Gen. St. 1915, § 4348 (must also be signed by the author); *Massachusetts*, Supplement to Rev. Laws 1902-1908, p. 192; *Minnesota*, Gen. St. 1913, § 568 (also requiring statement of amount paid or to be paid for the advertisement, the name of the candidate in whose behalf it is inserted, the name of any other person authorizing it, and the name of the author of it; it is also provided that no paper shall print any article or editorial of a political nature or concerning any candidate for office, unless within six months before the election it files in the office of the secretary of state a sworn statement of the names of owners of the paper, and, if the owner be a corporation, the names and addresses of the stockholders); *North Dakota*, Comp. Laws 1913, § 937; *Oregon*, L. O. L. § 3517; *South Carolina*, Civ. Code 1912, § 3089; *New Hampshire*, Laws and Statutes Supplement, 1913, pp. 72, 73 (must also have the name and address of the author); *Texas*, Vernon's Ann. Pen. Code 1916, art. 236, (penalty, fine of not less than \$500.00, nor more than \$1,000.00); *Washington*, Rem. & Bal. Code. vol. 2, § 4833.

⁵² For similar provisions, see *Florida*, Comp. Laws 1914, § 3841u; *Kansas*, Gen. St. 1915, § 4349; *Massachusetts*, Supplement to Revised Laws 1902-1908, p. 192; *New York*, Penal Law (Consol. Laws, c. 40) § 755 (soliciting a consideration for the support of a candidate for office); *North Dakota*, Comp. Laws 1913, § 937; *Oregon*, L. O. L. § 3517; *South Carolina*, Civ. Code 1912, § 3089; *Texas*, Vernon's Ann. Pen. Code 1916, art. 237; *Vermont*, Pub. St. 1906, § 106; *Washington*, Rem. & Bal. Code 1910, vol. 2, § 4833.

Any person who shall violate any of the provisions of this section shall be punished as for a corrupt practice.

STATUTE—UNITED STATES.

37 Stat. 554, c. 389, § 2 (U. S. Comp. St. § 7314):⁵³ That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised, shall be plainly marked "advertisement." Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised, without so marking the same, shall, upon conviction in any court having jurisdiction, be fined not less than fifty (\$50.00) dollars, nor more than five hundred (\$500.00) dollars.⁵⁴

E. FALSE ADVERTISEMENTS

STATUTE—IOWA.

Code Supp. 1913, § 5051a: Whoever with intent to sell, or in any wise dispose of merchandise, securities, service, or anything offered by him, directly or indirectly, to the public for sale or distribution, or with the intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, causes, with intent to defraud directly or indirectly, to be made, published, disseminated, circulated, or placed before the public in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue or deceptive, shall be guilty of a misdemeanor. Provided, however, that nothing herein contained shall be construed to place liability hereunder on

⁵³ Religious, fraternal, temperance, scientific and other similar publications are expressly excepted from the operation of the above act.

⁵⁴ Held constitutional in *Lewis Pub. Co. v. Morgan*, 229 U. S. 288, 33 Sup. Ct. 867, 57 L. Ed. 1190 (1912). The requirement is knit up with and incidental to the granting of second-class mail privileges. Publications designed primarily for advertising purposes are not entitled to such privileges.

any owner, publisher, agent, or employé of a newspaper or other publication, for the publication of such advertisement published in good faith.⁵⁵

F. ADVERTISING LOTTERIES

STATUTE—ILLINOIS.

Hurd's Rev. St. 1921, c. 38, § 183: Whoever knowingly prints, publishes, distributes, or circulates, or knowingly causes to be printed, published, distributed or circulated any advertisement of any lottery ticket or scheme, or any share in such ticket or scheme, for sale, either himself or by another person, or sets up, or exhibits, or devises, or makes for the purpose of being set up and exhibited, any sign, symbol, or emblematic or other representation of a lottery, or the drawing thereof, in any way indicating where a lottery ticket or any share thereof, or any such writing, certificate, bill, token, or other device before mentioned may be purchased or obtained, or in any way invites or entices, or attempts to invite or entice any person to purchase or receive the same, shall, for each offense, be fined not exceeding \$100.00.⁵⁶

⁵⁵ There are similar statutes in the following states: *Indiana*, Burns' Ann. St. 1914, § 2590d; *Kansas*, Gen. St. § 3687; *Louisiana*, Marr's Ann. St. § 1750; *Maryland*, 3 Code Pub. Gen. Laws, art. 27, § 160; *Massachusetts*, Supplement to Revised Laws 1902-1908, p. 1430; *Minnesota*, Gen. St. 1913, §§ 8902-8903; *New York*, Penal Law (Consol. Laws, c. 40) § 421; *North Dakota*, Comp. Laws 1913, §§ 9989-9991; *Oregon*, Gen. Laws 1917, p. 122; *South Dakota*, Comp. Laws 1913, Cr. Code, § 486; *Michigan*, Comp. Laws 1915, § 15049; *Washington*, Rem. & Bal. Code, vol. 3, § 2622-1.

It is made a penal offense in Connecticut to knowingly publish a false notice of any birth, marriage, or death. See Gen. St. Connecticut 1902, § 1165.

⁵⁶ There are similar statutes in the following states: *California*, Pen. Code, §§ 322 and 323; *Colorado*, Rev. St. 1908, §§ 4112 and 4115; *Connecticut*, Gen. St. 1902, § 1401; *Florida*, Comp. Laws 1914, § 3582; *Georgia*, Park's Pen. Code 1914, §§ 401 and 402 (prima facie case against the publisher, when advertisement of lottery is proved in a criminal trial against the publisher); *Indiana*, Burns' Ann. St. 1914, §§ 2464 and 2465; *Iowa*, Code 1897, § 5000; *Kansas*, Gen. St. 1915, §§ 255 and 3717; *Kentucky*, Carroll's St. 1915, §§ 1314-1317; *Louisiana*, Marr's Rev. St. § 1663 (publisher, proprietor, owner, or manager, whether individual employee, or corporate officer, liable, and each publication constitutes a separate offense); *Maine*, Rev. St. 1903, c. 129, § 20; *Massachusetts*, Rev. Laws 1902, c. 214, §§ 7, 11, 19; *Maryland*, 3 Code Pub. Gen. Laws, art. 27, §§ 309 and 310; *Michigan*, Comp. Laws 1915, §§ 15050 and 15053; *Minnesota*, Gen. St. 1913, §§ 8728 and 8731; *Mississippi*, Hemingway's Code 1917, §§ 1013 and 1014; *Montana*, Rev. Codes 1907, §§ 8409-8410; *Missouri*, Rev. St.

Ex parte JACKSON.

(Supreme Court of the United States, 1877. 96 U. S. 727, 24 L. Ed. 877.)

Petition for writs of habeas corpus and certiorari.

Section 3894 of the Revised Statutes (U. S. Comp. St. § 10383) provides that "no letter or circular concerning illegal lotteries, so-called gift concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public, for the purpose of obtaining money under false pretences, shall be carried in the mail. Any person who shall knowingly deposit or send any thing to be conveyed by mail, in violation of this section, shall be punishable by a fine of not more than \$500, nor less than \$100, with costs of prosecution." By an act approved July 12, 1876 (19 Stat. 90), the word "illegal" was stricken out of the section. Under the law as thus amended, the petitioner was indicted, in the Circuit Court of the United States for the Southern District of New York, for knowingly and unlawfully depositing, on the 23d of February, 1877, at that district, in the mail of the United States, to be conveyed in it, a circular concerning a lottery offering prizes, inclosed in an envelope addressed to one J. Ketcham, at Gloversville, New York. The indictment sets forth the offense in separate counts, so as to cover every form in which it could be stated under the act. Upon being arraigned, the petitioner stood mute, refusing to plead; and thereupon a plea of not guilty was entered in his behalf by order of the court. Rev. Stat., § 1032 (Comp. St. § 1698). He was subsequently tried, convicted, and sentenced to pay a fine of \$100, with the costs of the prosecution, and to be committed to the county jail until the fine and costs were paid. Upon his commitment, which followed, he presented to this court a petition alleging that he

1909, § 4771; *Nebraska*, Rev. St. § 8824; *Nevada*, Rev. St. 1912, § 6497; *New Hampshire*, Pub. St. 1901, c. 270, § 3; *New Jersey*, 2 Comp. St. p. 1764, § 58; *New Mexico*, Code 1915, § 1763; *New York*, Penal Law (Consol. Laws, c. 40) §§ 1374 and 1379; *North Carolina*, Fell's Revisal 1908, § 3725; *North Dakota*, Comp. Laws 1913, §§ 9665, 9668, 9669, 9674; *Ohio*, Page & Ad. Gen. Code, § 13067; *Oklahoma*, Rev. Laws 1910, §§ 2475, 2478, 2480; *Oregon*, L. O. L. § 2118; *Pennsylvania*, Purdon's Digest 1909, p. 977, § 322; *South Dakota*, Comp. Laws 1913, Cr. Code, §§ 384, 387, 389; *South Carolina*, Cr. Code 1912, § 259; *Utah*, Comp. Laws 1907, §§ 4256 and 4259; *Vermont*, Pub. St. 1906, § 5938; *Washington*, Rem. & Bal. Code, §§ 2465 and 2467; *Wisconsin*, St. 1913, § 4525.

The federal law prohibits the mailing of letters, packages, postal cards, and circulars concerning lotteries. See 35 Stat. 1129, U. S. Comp. St. § 10383.

was imprisoned and restrained of his liberty by the marshal of the Southern district of New York, under the conviction; that such conviction was illegal, and that the illegality consisted in this: that the court had no jurisdiction to punish him for the acts charged in the indictment; that the act under which the indictment was drawn, was unconstitutional and void; and that the court exceeded its jurisdiction in committing him until the fine was paid. He therefore prayed for a writ of habeas corpus to be directed to the marshal to bring him before the court, and a writ of certiorari to be directed to the clerk of the Circuit Court to send up the record of his conviction, that this court might inquire into the cause and legality of his imprisonment. Accompanying the petition, as exhibits, were copies of the indictment and of the record of conviction.

The court, instead of ordering that the writs issue at once, entered a rule, the counsel of the petitioner consenting thereto, that cause be shown, on a day designated, why the writs should not issue as prayed, and that a copy of the rule be served on the Attorney General of the United States, the marshal of the Southern district of New York, and the clerk of the Circuit Court. The Attorney General, for himself and others, answered the rule, by averring that the petition and exhibits do not make out a case in which this court has jurisdiction to order the writs to issue, and that the petitioner is in lawful custody by virtue of the proceedings and sentence mentioned in the exhibits, and the commitment issued thereon.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court.

The power vested in Congress "to establish post offices and post roads" has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents. The validity of legislation prescribing what should be carried, and its weight and form, and the charges to which it should be subjected, has never been questioned. What should be mailable has varied at different times, changing with the facility of transportation over the post roads. At one time, only letters, newspapers, magazines, pamphlets, and other printed matter, not exceeding eight ounces in weight, were carried; afterwards books were added to the list; and now small packages of merchandise, not exceeding a prescribed weight, as well as books and printed matter of all kinds, are transported in the

mail. The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded.

The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail. In their enforcement, a distinction is to be made between different kinds of mail matter,—between what is intended to be kept free from inspection, such as letters and sealed packages subject to letter postage, and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles.

The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail, and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.

Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value. If, therefore, printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress.

In 1836, the question as to the power of Congress to exclude publications from the mail was discussed in the Senate, and the prevailing opinion of its members, as expressed in debate, was against the existence of the power. President Jackson, in his annual message of the previous year, had referred to the attempted circulation through the mail of inflammatory appeals, addressed to the passions of the slaves, in

prints, and in various publications, tending to stimulate them to insurrection, and suggested to Congress the propriety of passing a law prohibiting, under severe penalties, such circulation of "incendiary publications" in the Southern States. In the Senate, that portion of the message was referred to a select committee, of which Mr. Calhoun was chairman, and he made an elaborate report on the subject, in which he contended that it belonged to the States, and not to Congress, to determine what is and what is not calculated to disturb their security, and that to hold otherwise would be fatal to the states; for if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary, and enforce their circulation. Whilst, therefore, condemning in the strongest terms the circulation of the publications, he insisted that Congress had not the power to pass a law prohibiting their transmission through the mail, on the ground that it would abridge the liberty of the press.

"To understand," he said, "more fully the extent of the control which the right of prohibiting circulation through the mail would give to the government over the press, it must be borne in mind that the power of Congress over the post office and the mail is an exclusive power. It must also be remembered that Congress, in the exercise of this power, may declare any road or navigable water to be a post road; and that, by the act of 1825, it is provided 'that no stage, or other vehicle which regularly performs trips on a post road, or on a road parallel to it, shall carry letters.' The same provision extends to packets, boats, or other vessels on navigable waters. Like provision may be extended to newspapers and pamphlets, which, if it be admitted that Congress has the right to discriminate in reference to their character, what papers shall or what shall not be transmitted by the mail, would subject the freedom of the press, on all subjects, political, moral, and religious, completely to its will and pleasure. It would in fact, in some respects, more effectually control the freedom of the press than any sedition law, however severe its penalties."

Mr. Calhoun, at the same time, contended that when a state had pronounced certain publications to be dangerous to its peace, and prohibited their circulation, it was the duty of Congress to respect its laws and co-operate in their enforcement, and whilst, therefore, Congress could not prohibit the transmission of the incendiary documents through the mails, it could prevent their delivery by the postmasters in the states where their circulation was forbidden. In the discussion upon the bill reported by him, similar views against the power

of Congress were expressed by other Senators, who did not concur in the opinion that the delivery of papers could be prevented when their transmission was permitted.

Great reliance is placed by the petitioner upon these views, coming, as they did in many instances, from men alike distinguished as jurists and statesmen. But it is evident that they were founded upon the assumption that it was competent for Congress to prohibit the transportation of newspapers and pamphlets over postal routes in any other way than by mail; and of course it would follow that if, with such a prohibition, the transportation in the mail could also be forbidden, the circulation of the documents would be destroyed, and a fatal blow given to the freedom of the press. But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of newspapers and pamphlets, when not sent as merchandise; but further than this its power of prohibition cannot extend.

Whilst regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters, or sealed packages subject to letter postage, without warrant, issued upon oath or affirmation, in the search for prohibited matter, they may be enforced upon competent evidence of their violation obtained in other ways; as from the parties receiving the letters or packages, or from agents depositing them in the post office, or others cognizant of the facts. And as to objectionable printed matter, which is open to examination, the regulations may be enforced in a similar way, by the imposition of penalties for their violation through the courts, and, in some cases, by the direct action of the officers of the postal service. In many instances, those officers can act upon their own inspection, and, from the nature of the case, must act without other proof; as where the postage is not prepaid, or where there is an excess of weight over the amount prescribed, or where the object is exposed, and shows unmistakably that it is prohibited, as in the case of an obscene picture or print. In such cases, no difficulty arises, and no principle is violated, in excluding the prohibited articles or refusing to forward them. The evidence respecting them is seen by every one, and is in its nature conclusive.

In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people, but to refuse it facilities for the distribution of matter deemed injurious to the public morals. Thus, by the act of March 3, 1873, Congress declared "that no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, where, or how, or of whom, or by what means, either of the things before mentioned may be obtained or made, nor any letter upon the envelope of which, or postal card upon which indecent or scurrilous epithets may be written or printed, shall be carried in the mail; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore mentioned articles or things, * * * shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every offense, be fined not less than \$100, nor more than \$5,000, or imprisonment at hard labor not less than one year nor more than ten years, or both, in the discretion of the judge."

All that Congress meant by this act was that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished. The same inhibition has been extended to circulars concerning lotteries,—institutions which are supposed to have a demoralizing influence upon the people. There is no question before us as to the evidence upon which the conviction of the petitioner was had; nor does it appear whether the envelope in which the prohibited circular was deposited in the mail was sealed or left open for examination. The only question for our determination relates to the constitutionality of the act; and of that we have no doubt.

The commitment of the petitioner to the county jail, until his fine was paid, was within the discretion of the court under the statute.

As there is an exemplified copy of the record of the petitioner's indictment and conviction accompanying the petition, the merits of his case have been considered at his request upon this application; and, as we are of opinion that his imprisonment is legal, no object would be subserved by issuing the writs; they are therefore denied.

G. ADVERTISING ABORTIFACIENT DRUGS AND INSTRUMENTS

STATUTE—ILLINOIS.

Hurd's Rev. St. 1921, c. 38, § 6: Whoever advertises, prints, publishes, distributes or circulates, or causes to be advertised, printed, published, distributed or circulated any pamphlet, printed paper, book, newspaper, notice, advertisement or reference, containing words or language giving or conveying any notice, hint, or reference to any person, or to the name of any person, real or fictitious, from whom or to any place, house, shop, or office, where any poison drug, mixture, preparation, medicine, or noxious things, or any instrument or means whatever, or any advice, information, direction or knowledge may be obtained, for the purpose of causing or procuring the miscarriage of any woman pregnant with child, shall be punished by imprisonment, not exceeding three years, or fine not exceeding \$1,000.00.⁵⁷

H. ADVERTISING CURES FOR VENEREAL DISEASES

STATUTE—WASHINGTON.

Rem. & Bal. Ann. Codes § 2462: Every proprietor, manager, or editor, who shall permit to be published, in any publication, whatever, any card or notice, advertising any treatment, or cure for any venereal disease or any disease or weak-

⁵⁷ The following states have similar enactments: *Arizona*, Pen. Code, 1913, § 318; *California*, Pen. Code, § 317; *Colorado*, Rev. St. 1908, § 1778; *Connecticut*, Gen. St. 1902, § 1325; *Delaware*, Rev. Code 1915, § 4710; *Florida*, Comp. Laws 1914, § 3539; *Idaho*, Rev. St. § 6843; *Indiana*, Burns' Ann. St. 1914, §§ 2359, 2360, 2362; *Iowa*, Code, § 4952; *Kansas*, Gen. St. 1915, § 3676; *Massachusetts*, Rev. Laws 1902, p. 1787; Supplement 1902-1908, p. 1437; *Michigan*, Comp. Laws 1915, §§ 15512, 15523-15525; *Minnesota*, Gen. St. 1913, §§ 8709-8710; *Mississippi*, Hemingway's Code 1917, § 1026; *Missouri*, Rev. St. 1909, § 4739; *Montana*, Rev. St. 1907, §§ 8399 and 8403 (specifying that proprietor, editor, or person in charge is liable), and see, also, sections 8393, and 8401; *Nebraska*, Rev. St. 1913, § 8606; *Nevada*, Rev. St. 1912, §§ 6452 and 6454; *New Jersey*, 2 Comp. St. 1709-1910, p. 1762, § 53; *New York*, Penal Law (Consol. Laws, c. 40) §§ 1142-1143; *North Dakota*, Comp. Laws 1913, § 9656; *Ohio*, Page & A. Gen. Code, § 13034 (adding the clause, "or which cautions females against its use when in a pregnant condition"); *Oregon*, L. O. L. § 2094; *Pennsylvania*, Purdon's Digest (13th Ed.) p. 986, § 361; *Rhode Island*, Gen. Laws 1909, p. 1279, § 24; *South Dakota*, Comp. Laws 1913, vol. 2, p. 654a, § 1; *Vermont*, Pub. St. 1906, § 5891; *Wyoming*, Comp. St. 1910, § 5913.

ness of the sexual organs caused by sexual vice or abuse shall be guilty of a misdemeanor.⁵⁸

I. ADVERTISING DEBTS FOR SALE, WITH NAMES OF DEBTORS

STATUTE—MAINE.

Rev. St. 1903, c. 130, § 7: "No person, firm, or corporation, shall publicly advertise for sale in any manner whatever or for any other purpose whatever, any list or lists of debts, dues, accounts, demands, notes, or judgments, containing the names of any or all of the persons who owe the same. Any such public advertisement containing the name of but one person who owes as aforesaid shall be construed as a list within the meaning of this section."⁵⁹

J. ADVERTISING INTOXICATING LIQUORS IN DRY TERRITORY

STATUTE—MAINE.

Rev. St. 1903, c. 29, § 45: Whoever advertises or gives notice of the sale or keeping for sale of intoxicating liquors, or knowingly publishes any newspaper in which such notices are given, shall be fined for such offence the sum of Twenty Dollars and costs.⁶⁰

⁵⁸ The following states have similar statutes: *Colorado*, Rev. St. 1908, § 1781; *Iowa*, Code 1897, § 4954; *Massachusetts*, Supplement to Rev. Laws 1902-1908, p. 1442; *Michigan*, Comp. Laws 1915, §§ 15512-15514; *Minnesota*, Gen. St. 1913, §§ 8709, 8710, 8711; *Montana*, Rev. Code 1907, §§ 8401 and 8403; *Nebraska*, Rev. St. 1913, § 8789; *North Dakota*, Comp. Laws 1913, § 9656; *Oregon*, L. O. L. § 2095; *Pennsylvania*, Purdon's Dig. 1909, § 360; *South Dakota*, Comp. Laws 1913, vol. 2, p. 654a, § 1; *Wisconsin*, St. 1913, § 4590.

⁵⁹ The statute imposes, as a penalty, liability to the person whose name is published in a sum not less than \$25 nor more than \$100. Section 8 of the statute excepts officers whose duty requires such publication. See, also, Rev. St. Mo. 1889, § 3782, where it is declared a misdemeanor to threaten to do any injury to the credit of another. In *State v. McCabe*, 135 Mo. 450, 37 S. W. 123, 34 L. R. A. 127, 58 Am. St. Rep. 589, a conviction was sustained under this statute against one who threatened to publish the name of another in a bad debtor column of a paper. The court said: "The state had provided every needed remedy, both ordinary and extraordinary, to enforce the payment of all just debts through the agency of the courts of justice, and among these remedies is not included the right to threaten to destroy credit and reputation."

⁶⁰ There are similar statutes in Mississippi (Hemingway's Code, § 2160), North Dakota (Comp. Laws, 1913, § 10133), and West Virginia (Code 1913, § 1287).

K. ADVERTISING TO PROCURE DIVORCES

STATUTE—MISSOURI.

Rev. St. 1909, § 4731: Whoever prints, publishes, distributes or circulates, or causes to be printed, published, distributed or circulated, any circular, pamphlet, card, handbill, advertisement, printed paper, book, notes, paper or notice of any kind offering to procure any divorce or severance, dissolution or annulment of any marriage, or offers to engage, appear or act as attorney or counsel in any suit for alimony or divorce, or the severance, dissolution or annulment of any marriage, either in this state or elsewhere, shall be deemed guilty of a misdemeanor. This section shall not apply to the printing or publishing of any notice or advertisement required or authorized by any law of this state.⁶¹

L. THREATS TO PUBLISH LIBEL

STATUTE—WASHINGTON.

Rem. & Bal. Ann. Codes, § 2432: Every person who shall threaten another with the publication of a libel concerning the latter, or his spouse, parent, child, or other member of his family, and every person who offers to prevent the publication of a libel upon another person upon conditions of the payment of, or with intent to extort money or other valuable consideration from any person, shall be guilty of a gross misdemeanor.⁶²

M. STATEMENT OF OWNERSHIP

STATUTE—NEW YORK.

General Business Law (Consol. Laws, c. 20) § 330: Every newspaper, magazine, or other periodically printed publication published in this state, shall publish in every copy of every issue, upon the outer cover or at the head of the edi-

⁶¹ See, also, *Arizona*, Rev. St. 1913, § 149; *New York*, Penal Law (Consol. Laws, c. 40) § 120; *Rhode Island*, Gen. Laws, 1909, c. 347, § 38.

⁶² See, also, *Arizona*, Rev. St. 1913, § 230; *New York*, Penal Law (Consol. Laws, c. 40) § 1351; *Rhode Island*, Gen. Laws 1909, c. 343 § 17; *Oklahoma*, Rev. Laws 1910, § 2387; *Idaho*, Rev. Codes, § 6745; *Florida*, Comp. Laws 1914, § 3261; *Nevada*, Rev. Laws 1912, § 6433; *North Dakota*, Comp. Laws 1913, § 9559; *South Dakota*, Comp. Laws. Pen. Code, § 324; *Utah*, Comp. Laws 1907, § 4205.

torial page, the full name and address of the owner, owners, proprietor or proprietors of such publication; and if said publication shall be owned or published by a corporation, then the name of the corporation, and the address of the principal place of business shall be published, together with the full names and addresses of the president, secretary and treasurer thereof; and if the said publication shall be owned or published by a partnership, limited partnership, or an unincorporated joint-stock association, then the full names and addresses of the partners or officers and managers of said partnership, limited partnership or unincorporated joint-stock association shall be published in like manner. The representative capacities of those named shall be indicated in like manner.⁶³

STATUTE—UNITED STATES.

37 Stat. 553, c. 389, § 2 (U. S. Comp. St. § 7313): That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication, to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April, and the first day of October of each year, on blanks furnished by the Post Office Department a sworn statement setting forth the names and post office addresses of the managing editor, publisher, business managers, and owners, and in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: Provided, that the provisions of this paragraph shall not apply to religious, fraternal, temperance and scientific or other similar publications: Provided further, that it shall not be necessary to include in such statement the names of persons owning less

⁶³ Section 331 of the New York statute provides as a penalty a fine of not less than \$100 nor more than \$500 for each issue neglected.

There are similar statutes in Mississippi (Hemingway's Code, §§ 1023, 1024, requiring printing name of editor only at head of editorial section), and in Pennsylvania (Purdon's Dig. 1909, p. 2253, § 12). See Gen. St. Minn. 1913, § 568, requiring filing of sworn statement of ownership with secretary of state in case the paper publishes any article or editorial of a political character.

See *Commonwealth v. Short*, 38 Pa. Super. Ct. 562, 566 (1909), affirmed, 228 Pa. 279, 77 Atl. 449 (1910), construing and applying the Pennsylvania statute.

than one percentum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.⁶⁴

N. SECOND-CLASS MAIL PRIVILEGES

STATUTE—UNITED STATES.

U. S. Comp. St. § 7304: Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections twelve and fourteen.

Sec. 7305. Matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject: Provided, that nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same.

Sec. 7306. The conditions upon which a publication shall be admitted to the second class are as follows: First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications. Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers: Provided, however, that nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

Sec. 7307. Foreign newspapers and other periodicals of the same general character as those admitted to the second

⁶⁴ Held constitutional in *Lewis Pub. Co. v. Morgan*, Postmaster in New York City, 229 U. S. 288, 33 Sup. Ct. 867, 57 L. Ed. 1190 (1912).

class in the United States, may, under the direction of the Postmaster General, on application of the publishers thereof or their agents, be transmitted through the mails at the same rates as if published in the United States. Nothing in this act shall be so construed as to allow the transmission through the mails of any publication which violates any copyright granted by the United States.

Sec. 7308. Publishers of matter of the second class may without subjecting it to extra postage, fold within their regular issues a supplement; but in all cases the added matter must be germane to the publication which it supplements, that is to say, matter supplied in order to complete that to which it is added or supplemented, but omitted from the regular issue for want of space, time, or greater convenience, which supplement must in every case be issued with the publication.

Sec. 7309. From and after the passage of this Act all periodical publications issued from a known place of publication at stated intervals, and as frequently as four times a year, by or under the auspices of a benevolent or fraternal society or order organized under the lodge system and having a bona fide membership of not less than one thousand persons, or by a regularly incorporated institution of learning, or by a regularly established state institution of learning supported in whole or in part by public taxation, or by or under the auspices of a trade union, and all publications of strictly professional, literary, historical, or scientific societies, including the bulletins issued by state boards of health, and by state boards or departments of public charities and corrections, shall be admitted to the mails as second-class matter, and the postage thereon shall be the same as on other second-class matter; and such periodical publications, issued by or under the auspices of benevolent or fraternal societies or orders or trades unions, or by strictly professional, literary, historical, or scientific societies, shall have the right to carry advertising matter, whether such matter pertains to such benevolent or fraternal societies or orders, trades unions, strictly professional, literary, historical, or scientific societies, or to other persons, institutions, or concerns; but such periodical publications, hereby permitted to carry advertising matter, must not be designed or published primarily for advertising purposes, and shall be originated and published to further the objects and purposes of such benevolent or fraternal societies or orders, trades unions, or other societies, respectively; and all such periodicals shall be formed of printed paper sheets without board, cloth, leather or other substantial binding, such as distinguish printed books for preservation from

periodical publications: Provided, that the circulation through the mails of periodical publications issued by, or under the auspices of, benevolent or fraternal societies or orders, or trades unions, or by strictly professional, literary, historical, or scientific societies, as second-class mail matter, shall be limited to copies mailed to such members as pay therefor, either as a part of their dues or assessments, or otherwise, not less than fifty per centum of the regular subscription price; to other bona fide subscribers; to exchanges, and ten per centum of such circulation as sample copies: Provided further, that when such members pay therefor as a part of their dues or assessments, individual subscriptions or receipts shall not be required: Provided further, that the office of publication of any such periodical publication shall be fixed by the association or body by which it is published, or by its executive board, and such publication shall be printed at such place and entered at the nearest post office thereto.

Sec. 7310. All periodical publications issued from a known place of publication at stated intervals as frequently as four times a year by state departments of agriculture shall be admitted to the mails as second-class mail matter: Provided, that such matter shall be published only for the purpose of furthering the objects of such departments: and provided further, that such publications shall not contain any advertising matter of any kind.

Sec. 7311. The Postmaster General, when in his judgment it shall be necessary, may prescribe, by regulation, an affidavit in form, to be taken by each publisher of any newspaper or periodical publication sent through the mails under the provisions of this act, or news agent who distributes any of such newspapers or periodical publications under the provisions of this act, or employé of such publisher or news agent, stating that he will not send, or knowingly permit to be sent, through the mails any copy, or copies of such newspaper or periodical publication except to regular subscribers thereto, or news agents, without prepayment of postage thereon at the rate of one cent for each two ounces or fractional part thereof; and if such publisher or news agent, or employé of such publisher or news agent, when required by the Postmaster General or any special agent of the Post Office Department to make such affidavit, shall refuse so to do, and shall thereafter, without having made such affidavit deposit any newspapers in the mail for transmission, he shall be deemed guilty of a misdemeanor, and on conviction, shall be fined not exceeding one thousand dollars for each refusal; and if any such person shall knowingly and willfully mail any such matter without the payment of postage as provided by this act, or procure the same to be

done with the intent to avoid the prepayment of postage due thereon; or if any postmaster or post office official shall knowingly permit any such matter to be mailed without prepayment of postage as provided in this act, and in violation of the provisions of the same, he or they shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined not more than one thousand dollars, or imprisoned not exceeding one year, one or both, in the discretion of the court.

Sec. 7312. When any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested.

POSTAGE.

U. S. Comp. St. 1918—§ 7356. On and after the first day of January, eighteen hundred and seventy-five, all newspapers and periodical publications mailed from a known office of publication or news agency, and addressed to regular subscribers or news agents, postage shall be charged at the following rates:

* * *

Sec. 7357. On and after the first day of January, eighteen hundred and seventy-five, upon the receipt of such newspapers and periodical publications at the office of mailing, they shall be weighed in bulk, and postage paid thereon by a special adhesive stamp, to be devised and furnished by the Postmaster General, which shall be affixed to such matter, or to the sack containing the same, or upon a memorandum of such mailing, or otherwise, as the Postmaster General may, from time to time, provide by regulation.

Sec. 7358. All publications of the second class except as provided in section twenty-five of said act, when sent by the publisher thereof, and from the office of publication, including sample copies, or when sent from a news agency to actual subscribers thereto, or to other news agents, shall, on and after July first, eighteen hundred and eighty-five, be entitled to transmission through the mails at one cent a pound or a fraction thereof, such postage to be prepaid as now provided by law.

Sec. 7358a. On and after July first, nineteen hundred and eighteen, the rates of postage on publications entered as second-class matter (including sample copies to the extent of ten per centum of the weight of copies mailed to subscribers during the calendar year) when sent by the publisher thereof from the post office of publication or other post office, or when sent by a news agent to actual subscribers thereto, or to other news agents for the purpose of sale:

(a) In the case of the portion of such publication devoted to matter other than advertisements, shall be as follows: (1)

on and after July first, nineteen hundred and eighteen, and until July first, nineteen hundred and nineteen, $1\frac{1}{4}$ cents per pound or fraction thereof; (2) on and after July first, nineteen hundred and nineteen, $1\frac{1}{2}$ cents per pound or fraction thereof.

(b) In the case of the portion of such publication devoted to advertisements the rates per pound or fraction thereof for delivery within the several zones applicable to fourth-class matter shall be as follows (but where the space devoted to advertisements does not exceed five per centum of the total space, the rate of postage shall be the same as if the whole of such publication was devoted to matter other than advertisements):

(1) On and after July first, nineteen hundred and eighteen, and until July first, nineteen hundred and nineteen, for the first and second zones, $1\frac{1}{4}$ cents; for the third zone, $1\frac{1}{2}$ cents; for the fourth zone, 2 cents; for the fifth zone, $2\frac{1}{4}$ cents; for the sixth zone, $2\frac{1}{2}$ cents; for the seventh zone, 3 cents; for the eighth zone, $3\frac{1}{4}$ cents; (2) on and after July first, nineteen hundred and nineteen, and until July first, nineteen hundred and twenty, for the first and second zones, $1\frac{1}{2}$ cents; for the third zone, 2 cents; for the fourth zone, 3 cents; for the fifth zone, $3\frac{1}{2}$ cents; for the sixth zone, 4 cents; for the seventh zone, 5 cents; for the eighth zone, $5\frac{1}{2}$ cents; (3) on and after July first, nineteen hundred and twenty, and until July first, nineteen hundred and twenty-one, for the first and second zones, $1\frac{3}{4}$ cents; for the third zone, $2\frac{1}{2}$ cents; for the fourth zone, 4 cents; for the fifth zone, $4\frac{3}{4}$ cents; for the sixth zone, $5\frac{1}{2}$ cents; for the seventh zone, 7 cents; for the eighth zone, $7\frac{3}{4}$ cents; (4) on and after July first, nineteen hundred and twenty-one, for the first and second zones, 2 cents; for the third zone, 3 cents; for the fourth zone, 5 cents; for the fifth zone, 6 cents; for the sixth zone, 7 cents; for the seventh zone, 9 cents; for the eighth zone, 10 cents.

(c) With the first mailing of each issue of each such publication, the publisher shall file with the postmaster a copy of such issue, together with a statement containing such information as the Postmaster General may prescribe for determining the postage chargeable thereon.

Sec. 7358b. In the case of newspapers and periodicals entitled to be entered as second-class matter and maintained by and in the interest of religious, educational, scientific, philanthropic, agricultural, labor, or fraternal organizations or associations, not organized for profit and none of the net income of which inures to the benefit of any private stockholder or individual, the second-class postage rates shall be, irrespective of the zone in which delivered (except when the same are deposited in a letter carrier office for delivery by its car-

riers, in which case the rates shall be the same as now provided by law), $1\frac{1}{8}$ cents a pound or fraction thereof on and after July first, nineteen hundred and eighteen, and until July first, nineteen hundred and nineteen and on and after July first, nineteen hundred and nineteen, $1\frac{1}{4}$ cents a pound or fraction thereof. The publishers of such newspapers or periodicals before being entitled to the foregoing rates shall furnish to the Postmaster General, at such times and under such conditions as he may prescribe, satisfactory evidence that none of the net income of such organizations inures to the benefit of any private stockholder or individual.

Sec. 7358c. Where the total weight of any one edition or issue of any publication mailed to any one zone does not exceed one pound, the rate of postage shall be 1 cent.

Sec. 7358d. The zone rates provided by this title shall relate to the entire bulk mailed to any one zone and not to individually addressed packages.

Sec. 7359. After the thirtieth day of June, eighteen hundred and ninety-eight, the use of newspaper and periodical stamps may be discontinued, and all postage on second-class matter mailed shall be collected and accounted for under such regulations as the Postmaster General may prescribe: And provided further, that this shall in no manner be construed so as to repeal the present law requiring prepayment of postage upon second-class mail matter.

Sec. 7360. Publications of the second class, one copy to each actual subscriber residing in the county where the same are printed, in whole or in part, and published, shall go free through the mails; but the same shall not be delivered at letter carrier offices, or distributed by carriers, unless postage is paid thereon at the rate prescribed in section thirteen of this act: Provided, that the rate of postage on newspapers, excepting weeklies, and periodicals not exceeding two ounces in weight, when the same are deposited in a letter carrier office for delivery by its carriers, shall be uniform at one cent each; periodicals weighing more than two ounces shall be subject, when delivered by such carriers, to a postage of two cents each, and these rates shall be prepaid by stamps affixed.

Sec. 7360a. The rate of postage on daily newspapers, when the same are deposited in a letter carrier office for delivery by its carriers, shall be the same as now provided by law; and • nothing in this title shall affect existing law as to free circulation and existing rates on second-class mail matter within the county of publication: Provided, that the Postmaster General may hereafter require publishers to separate or make up to

zones in such a manner as he may direct all mail matter of the second class when offered for mailing.

Sec. 7361. The rate of postage on newspaper and periodical publications of the second class, when sent by others than the publisher or news agent, shall be one cent for each four ounces or fractional part thereof, and shall be fully prepaid by postage stamps affixed to said matter.

Sec. 7361a. Where a newspaper or periodical is mailed by other than the publisher or his agent, or a news agent or dealer, the rate shall be the same as now provided by law.

CHAPTER VII

COPYRIGHT

Points Involved.—1. What are the steps necessary for procuring a copyright under the copyright statute?

2. What rights are secured to one by a compliance with the provisions of the copyright statute?

3. What are one's common-law rights in his literary productions, as compared with the rights which may be secured under the statute?

4. Under what circumstances are one's common-law rights lost?

5. What does publication consist of, and why is it necessary to consider the question of publication?

6. What writings and productions are the subject of copyright?

7. What constitutes an infringement of one's copyright?

8. What remedies are afforded by the common law for a violation of the common law right in literary property?

9. What remedies are prescribed by statute for infringement of one's copyright?

1. Procuring a Copyright.—The necessary steps for procuring a copyright are succinctly set forth in the instructions from the Copyright Office.¹

¹ Following is a copy of a circular letter of advice issued by the Copyright Office:

Steps Necessary to Secure Copyright Registration in the United States under the Act of March 4, 1909, as Amended.

For works reproduced in copies for sale:

1. *Publish the work with the copyright notice.* The notice may be in the form "Copyright, 19— (year of date of publication) by — (name of copyright proprietor)." The name of the copyright proprietor given in the notice should be the true, legal name of the person, firm, or corporation owning the copyright, and no other. The use of a fictitious or assumed name, or the name of any person other than the copyright proprietor, may result in the loss of the copyright protection. * * * The date in the copyright notice should agree with the year date of publication.

2. Promptly after publication, send to the Copyright Office two

2. **Distinction Between Common Law and Statutory Rights in Literary Property.**—Without the aid of statute, all rights in one's literary productions are gone when they are published by or with the author's consent. Conversely, prior to publication, the author's rights are absolute. If B. should surreptitiously secure A.'s manuscript and publish or

copies of the best edition of the work, with an application for registration and a *money order* payable to the Register of Copyrights for the statutory registration fee of \$1. As to special registration of photographs, see below.

In the case of *books* the copies deposited must be accompanied by an *affidavit*, under the official seal of an officer authorized to administer oaths, stating that the typesetting, printing, and binding of the book have been performed within the United States. Affidavit and application forms will be supplied by this office on request.

This affidavit is not required in the case of a book of foreign origin in a language or languages other than English, nor in the case of a printed play in any language, as such works are not required to be manufactured in the United States.

In the case of contributions to periodicals send one complete copy of the periodical containing the contribution with application and fee. No affidavit is required.

Only one copy is required to be deposited in the case of a work by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country.

For works not reproduced in copies for sale:

Copyright may also be had of certain classes of works—see (a), (b), (c), etc., below—of which copies are not reproduced for sale, by filing in this office an application for registration, with the statutory fee of \$1, sending therewith:

(a) In the case of lectures or other oral addresses, or of dramatic or musical compositions, *one complete manuscript or typewritten copy of the work.*

(b) In the case of photographs not intended for general circulation, *one photographic print.* As to special fee, see below.

(c) In the case of works of art (paintings, drawings, sculpture), or of drawings or plastic works of a scientific or technical character, *one photograph or other identifying reproduction of the work.*

(d) In the case of *motion picture photoplays*, a title and description, with one print taken from each scene or act.

(e) In the case of *motion pictures other than photoplays*, a title and description, with not less than two prints taken from different sections of a complete motion picture.

In the case of each of the works here noted, not reproduced in copies for sale, the law expressly requires that a second deposit of printed copies for registration and the payment of a second fee must be made upon publication.

Fees: The statutory fee for registration of any work, except a photograph, is one dollar, including a certificate of registration under seal. In the case of a *photograph*, if a certificate is not demanded the fee is fifty cents. In the case of several volumes of the same *book* deposited at the same time, only one registration at one fee is required.

Because of the procedure now followed under the rules of the Treasury Department, by which the Register of Copyrights deposits

attempt to publish it, A. could secure an injunction against its further use by B., and such damages as he may have suffered.

By act of Congress in the United States, one may by a simple procedure secure to himself and his heirs complete protection in his published works for a period of twenty-eight years with the privilege of renewal for a like period. Compliance with the terms of the act secures to the author or the one to whom he has sold his rights, the exclusive right:

(a) To print, reprint, publish copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages, or make any version of it, if it be a literary work; to dramatize it, if it be a nondramatic work; to convert it into a novel or other nondramatic work, if it be a drama;

(c) To deliver or authorize the delivery of the copyrighted work in public for profit, if it be a lecture, sermon, address, or similar production;

(d) To perform or represent the copyrighted work publicly if it be a drama or musical composition.²

Since securing a copyright requires one as a first step to publish his production, the common-law right is obviously gone when the copyright under the act is secured.

Since publication is always fatal to one's common-law rights, and is essential to one's rights under the Copyright Act (U. S. Comp. St. §§ 9517-9524, 9530-9584), it is necessary to determine what constitutes publication.

3. What Constitutes Publication?—Offering the production for sale to the general public is without doubt a publication; indeed, the most common example of it. Present-

all moneys received directly to the credit of the Treasurer of the United States, checks cannot be accepted for payment of copyright fees. To avoid trouble in having them returned checks should therefore not be sent for fees. All remittances should be made by money order or bank draft, payable to the Register of Copyrights.

[Signed] Thorvald Solber, Register of Copyrights.

See sections 18 and 19 of the Copyright Act, *infra*, p. 389, for information concerning the place of the copyright notice.

² A fuller statement as to the rights secured to an author by the law of copyright will be found in the first part of the Copyright Act, *infra*, page 384.

ing it to a public library is given a similar effect. In neither of these cases is it necessary that any one should have actually purchased or read it. In *Jeweler's Mercantile Agency v. Jewelers' Weekly Publishing Company* (p. 396, *infra*) it was held that the subterfuge of assuming to lease the book, instead of to sell it, would also constitute a publication, since it appeared that any one might become a subscriber and lessee. There was, therefore, in such a case an offering to the general public. On the other hand, the mere printing of the manuscript is not a publication. Nor is the lending of the manuscript or of the printed book to a friend to read. Likewise, a teacher has not published his lectures by delivering them orally to his pupils, or even by allowing them to peruse and make copies of the manuscript.³ In such cases the production has not been offered to the general public. Such protection as the author has is by virtue of the common law, and that is adequate.

Publication in a Newspaper or Periodical.—It is well to note in this connection that a contribution to a newspaper or periodical, even though it be in serial form, is published, as to each installment, when the paper or periodical is published. The legal rights of the publishers or author can only be conserved by copyrighting the entire issue or the particular contribution as it comes out, viz. by printing upon the periodical or article as the case may be the required notice of copyright and promptly depositing two copies with the Register of Copyrights. One cannot wait until the serial story is completed.

4. What Writings or Productions are Copyrightable?—The answer is found in general terms in the Copyright Act (section 4) as follows: “* * * The works for which copyright may be secured under this act shall include all the writings of an author.” And section 5 sheds further light on the subject by providing that the application for registration shall specify to which of the following classes the work belongs: (a) Books, including composite and cyclopædic works, directories, gazetteers, and other compila-

³ *Bartlett v. Crittenden*, 5 McLean, 32 Fed. Cas. No. 1,076, *infra*, page 401.

tions; (b) periodicals, including newspapers; (c) lectures, sermons, addresses (prepared for oral delivery); (d) dramatic or dramatico-musical compositions; (e) musical compositions; (f) maps; (g) works of art; models or designs for works of art; (h) reproductions of works of art; (i) drawings or plastic works of a scientific or technical character; (j) photographs; (k) prints and pictorial illustrations; (l) motion picture photoplays; (m) motion pictures, other than photoplays.

It was held in the English case of *Walter v. Lane* (p. 410, *infra*) that one who attempted to give a verbatim report of a public address was not an "author," within the meaning of the English act, and hence could not copyright the published report. But the court adds: "If the reporter of a speech gives the substance of it in his own language, if, although the ideas are not his, his expression of them is his own, and not the speaker's, with immaterial differences, the reported speech would be an original composition, of which the reporter would be the author, and he would be entitled to copyright in his own production." In *J. H. White Mfg. Co. v. Shapiro* (p. 414, *infra*) the federal court for the Southern district of New York held that a commercial catalogue of brass goods, which consisted principally of trimmings for electric light fixtures was a proper subject of copyright.

5. What Constitutes Infringement?—Infringement of copyright is not limited to the verbatim copying of the whole or a large part of the copyrighted work. It will include paraphrasing and even the appropriation of the literary work, labor, and ideas of another, such, for example, as arrangement and selections of materials, as well as mere language. "Actual copying, or such paraphrasing as to be equivalent to copying, was at first considered to be the only form of infringing use of copyrighted material," says the court in *West Publishing Company v. Edward Thompson Co.* (p. 415, *infra*), but adds that "the great diversity of printed publications, and the many phases of literary activity, especially when applied to minor pursuits, ultimately forced the construction of the copyrighted statute, in

which the basis of injury is found in the unfair use of the material of the work in making up a book of similar nature, as well as in a direct copying or paraphrasing of the words therein contained."

Extracts and quotations may be used, it is said, to a limited extent for purposes of illustration or criticism. Such practice should undoubtedly be indulged in sparingly, however, without first obtaining the consent of the owner of the copyright. How far it may be carried without consent is an open question—certainly somewhere short of the point where it would be at all likely to cut in on the sale of the original, by serving as a substitute for the book quoted from or reviewed. Speaking to this question, the court in *Story v. Holcombe* (p. 419, *infra*) said:

"The infringement of a copyright does not depend so much upon the length of the extracts as upon their value. If they embody the spirit and the force of the work in a few pages, they take from it that in which its chief value consists. This may be done to a reasonable extent by a reviewer, whose object is to show the merit or demerit of the work. But this privilege must not be so exercised as to supersede the original book. * * * Sufficient may be taken to give a correct idea of the whole; but no one is allowed, under the pretense of quoting, to publish either the whole or the principal part of another man's composition, and therefore a review must not serve as a substitute for the book reviewed. If so much be extracted, that the article communicates the same knowledge as the original work, it is an actionable violation of literary property."

6. Remedies.—For a violation of one's common-law rights, an action for damages and an injunction to restrain the violation will lie.

The Copyright Act provides like remedies for infringement of the statutory right. The more general provisions of the act are as follows (section 25):

"That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

“(a) To an injunction restraining such infringement;

“(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement. * * *”

Where the infringer has acted in good faith, the statute in a few cases places restrictions upon the amount of damages to be awarded, for example, by providing that, “in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars,” etc.

SECTION 1.—CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

Article I, § 8, cl. 8: Congress shall have the power “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”⁴

⁴ Pursuant to this authority, the following acts have been passed: 1790, first copyright law; covered maps, charts, and books; 14-year term, with privilege of renewal. 1831, acts of 1790 and 1802 repealed, and single, new statute enacted; extended term to 28 years, with privilege of renewal to author, widow, or children, for 14 years. 1856, dramatists given protection. 1865, photographs and negatives added. 1870, all previous statutes repealed and entire law of copyright embodied in one act; act added paintings, drawings, chromos, statues, and models or designs. 1873-74, law again revised. 1909, Act March 4, 1909, c. 320, 35 Stat. 1075 (U. S. Comp. St. §§ 9517-9524, 9530-9584); previous acts consolidated and amended; term 28 years, with privilege of renewal to author, widow, or children, or executor, for period of 28 years, 1912, amendment adding motion picture photoplays, and motion pictures, other than photoplays.

AN ACT TO AMEND AND CONSOLIDATE THE ACTS
RESPECTING COPYRIGHT⁵

(35 Statutes at Large, Part 1, p. 1075 [U. S. Comp. St. §§ 9517-9524, 9530-9584].)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That any person entitled thereto, upon complying with the provisions of this act, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production;

(d) To perform or represent the copyrighted work publicly, if it be a drama, or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever.

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit. * * *

Sec. 2. That nothing in this act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

Sec. 3. That the copyright provided by this act shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in

⁵ Bulletin No. 15 of the Copyright Office contains a careful analysis of the act.

respect thereto which he would have if each part were individually copyrighted under this act.

Sec. 4. That the works for which copyright may be secured under this act shall include all the writings of an author.

Sec. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

- (a) Books, including composite and cyclopædic works, directories, gazetteers, and other compilations;
- (b) Periodicals, including newspapers;
- (c) Lectures, sermons, addresses (prepared for oral delivery);
- (d) Dramatic or dramatico-musical compositions;
- (e) Musical compositions;
- (f) Maps;
- (g) Works of art; models or designs for works of art;
- (h) Reproductions of a work of art;
- (i) Drawings or plastic works of a scientific or technical character;
- (j) Photographs;
- (k) Prints and pictorial illustrations;
- (l) *Motion picture photoplays;*
- (m) *Motion pictures other than photoplays:*⁶

Provided, nevertheless, that the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this act, nor shall any error in classification invalidate or impair the copyright protection secured under this act.

Sec. 6. That compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this act; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.

Sec. 7. [Omitted.]

Sec. 8. That the author or proprietor of any work made the subject of copyright by this act, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this act:

⁶ The changes marked, and the addition of the words printed in italics, are authorized by the amendatory Act of August 24, 1912.

Provided, however, that the copyright secured by this act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only:

(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work, or

(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this act may require.

Sec. 9. That any person entitled thereto by this act may secure copyright for his work by publication thereof with the notice of copyright required by this act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section twenty-one of this act.

Sec. 10. That such person may obtain registration of his claim to copyright by complying with the provisions of this act, including the deposit of copies, and upon such compliance the Register of Copyrights shall issue to him the certificate provided for in section fifty-five of this act.

Sec. 11. That copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or *dramatico-musical* composition; *of a title and description, with one print taken from each scene or act, if the work be a motion picture photoplay*; of a photographic print if the work be a photograph; *of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay*;⁷ or of a photograph or other indentifying reproduction thereof, if it be a work of art or a plastic

⁷ The words printed in italics indicate the amendments authorized by the amendatory Act of August 24, 1912.

work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections twelve and thirteen of this act, where the work is later reproduced in copies for sale.

Sec. 12. That after copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this act, there shall be promptly deposited in the Copyright Office or in the mail addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, *or if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country*, which copies *or copy*,⁸ if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section fifteen of this act; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work is not reproduced in copies for sale, there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section eleven of this act, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this act with respect to the deposit of copies and registration of such work shall have been complied with.

Sec. 13. That should the copies called for by section twelve of this act not be promptly deposited as herein provided, the Register of Copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of one hundred dollars and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void.

⁸ The words printed in italics in section 12 are inserted by the amendatory Act of March 28, 1914, which also provides "that all acts or parts of acts in conflict with the provisions of this act are hereby repealed."

Sec. 14. That the postmaster to whom are delivered the articles deposited as provided in sections eleven and twelve of this act shall, if requested, give a receipt therefor and shall mail them to their destination without cost to the copyright claimant.

Sec. 15. That of the printed book or periodical specified in section five, subsections (a) and (b), of this act, except the original text of a book of foreign origin in a language or languages other than English, the text of all copies accorded protection under this act, except as below provided, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photo-engraving process, then by a process wholly performed within the limits of the United States, and the printing of the text and binding of the said book shall be performed within the limits of the United States; which requirements shall extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, or photo-engraving process, and also to separate lithographs or photo-engravings, except where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art; but they shall not apply to works in raised characters for the use of the blind, or to books of foreign origin in a language or languages other than English, or to books published abroad in the English language seeking ad interim protection under this act.

Sec. 16. That in the case of the book the copies so deposited shall be accompanied by an affidavit, under the official seal of any officer authorized to administer oaths within the United States, duly made by the person claiming copyright or by his duly authorized agent or representative residing in the United States, or by the printer who has printed the book, setting forth that the copies deposited have been printed from type set within the limits of the United States or from plates made within the limits of the United States from type set therein; or, if the text be produced by lithographic process, or photo-engraving process, that such process was wholly performed within the limits of the United States, and that the printing of the text and binding of the said book have also been performed within the limits of the United States. Such affidavit shall state also the place where and the establishment or establishments in which such type was set or plates were made or lithographic process, or photo-engraving process or printing and binding were performed and the date

of the completion of the printing of the book or the date of publication.

Sec. 17. That any person who, for the purpose of obtaining registration of a claim to copyright, shall knowingly make a false affidavit as to his having complied with the above conditions shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, and all of his rights and privileges under said copyright shall thereafter be forfeited.

Sec. 18. That the notice of copyright required by section nine of this act shall consist either of the word "Copyright" or the abbreviation "Copr.," accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section five of this act, the notice may consist of the letter C inclosed within a circle, thus: ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: Provided, that on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright is subsisting when this act shall go into effect, the notice of copyright may be either in one of the forms prescribed herein or in one of those prescribed by the Act of June eighteenth, eighteen hundred and seventy-four.

Sec. 19. That the notice of copyright shall be applied, in the case of a book or other printed publication, upon its title-page or the page immediately following, or if a periodical, either upon the title-page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title-page or the first page of music: Provided, that one notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice.

Sec. 20. That where the copyright proprietor has sought to comply with the provisions of this act with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor

shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct.

Sec. 21. That in the case of a book published abroad in the English language before publication in this country, the deposit in the Copyright Office, not later than thirty days after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and of the date of publication of the said book, shall secure to the author or proprietor an *ad interim* copyright, which shall have all the force and effect given to copyright by this act, and shall endure until the expiration of thirty days after such deposit in the Copyright Office.

Sec. 22. That whenever within the period of such *ad interim* protection an authorized edition of such book shall be published within the United States, in accordance with the manufacturing provisions specified in section fifteen of this act, and whenever the provisions of this act as to deposit of copies, registration, filing of affidavit, and the printing of the copyright notice shall have been duly complied with, the copyright shall be extended to endure in such book for the full term elsewhere provided in this act.

Sec. 23. That the copyright secured by this act shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: Provided, that in the case of any posthumous work or of any periodical, cyclopædic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, that in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopædic or other composite work when such contribution has been separately registered, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of

the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, that in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

Sec. 24. That the copyright subsisting in any work at the time when this act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this act, including the renewal period: Provided however, that if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section: Provided, that application for such renewal and extension shall be made to the Copyright Office and duly registered therein within one year prior to the expiration of the existing term.

Sec. 25. That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) To an injunction restraining such infringement;

(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in ⁹ case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars, *and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been rea-*

⁹ The word "the" before the words "case of a newspaper reproduction," etc., was struck out by the amendatory Act of August 24, 1912.

*sonably foreseen, such damages shall not exceed the sum of one hundred dollars; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of five thousand dollars nor be less than two hundred and fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.*¹⁰

First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section five of this act, except a painting, statue, or sculpture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance;

(c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

(d) To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order; * * *

Sec. 26. That any court given jurisdiction under section thirty-four of this act may proceed in any action, suit, or pro-

¹⁰ The words printed in italics indicate the amendments authorized by the amendatory Act of August 24, 1912.

ceeding instituted for violation of any provision hereof to enter a judgment or decree enforcing the remedies herein provided.

Sec. 27. That the proceedings for an injunction, damages, and profits, and those for the seizure of infringing copies, plates, molds, matrices, and so forth, aforementioned, may be united in one action.

Sec. 28. That any person who willfully and for profit shall infringe any copyright secured by this act, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than one hundred dollars nor more than one thousand dollars, or both, in the discretion of the court: Provided, however, that nothing in this act shall be so construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit.

Sec. 29. That any person who, with fraudulent intent, shall insert or impress any notice of copyright required by this act, or words of the same purport, in or upon any uncopyrighted article, or with fraudulent intent shall remove or alter the copyright notice upon any article duly copyrighted shall be guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars and not more than one thousand dollars. Any person who shall knowingly issue or sell any article bearing a notice of United States copyright which has not been copyrighted in this country, or who shall knowingly import any article bearing such notice or words of the same purport, which has not been copyrighted in this country, shall be liable to a fine of one hundred dollars.

Sec. 30. That the importation into the United States of any article bearing a false notice of copyright when there is no existing copyright thereon in the United States, or of any piratical copies of any work copyrighted in the United States, is prohibited.

[Sections 31, 32, 33. Omitted.]

Sec. 34. That all actions, suits, or proceedings arising under the copyright laws of the United States shall be originally cognizable by the Circuit Courts of the United States, the District Court of any territory, the Supreme Court of the District of Columbia, the District Courts of Alaska, Hawaii, and

Porto Rico, and the courts of first instance of the Philippine Islands.

Sec. 35. That civil actions, suits, or proceedings arising under this act may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found.

Sec. 36. That any such court or judge thereof shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by said laws, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this act may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by proceedings in contempt or otherwise by any other court or judge possessing jurisdiction of the defendants.

[Sections 37, 38, 39, 40. Omitted.]

Sec. 41. That the copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this act shall be deemed to forbid, prevent or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.

Sec. 42. That copyright secured under this or previous acts of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will.

Sec. 43. That every assignment of copyright executed in a foreign country shall be acknowledged by the assignor before a consular officer or secretary of legation of the United States authorized by law to administer oaths or perform notarial acts. The certificate of such acknowledgment under the hand and official seal of such consular officer or secretary of legation shall be prima facie evidence of the execution of the instrument.

Sec. 44. That every assignment of copyright shall be recorded in the Copyright Office within three calendar months after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded.

Sec. 45. That the Register of Copyrights shall, upon pay-

ment of the prescribed fee, record such assignment, and shall return it to the sender with a certificate of record attached under seal of the Copyright Office, and upon the payment of the fee prescribed by this act he shall furnish to any person requesting the same a certified copy thereof under the said seal.

Sec. 46. That when an assignment of the copyright in a specified book or other work has been recorded the assignee may substitute his name for that of the assignor in the statutory notice of copyright prescribed by this act.

Sec. 47. That all records and other things relating to copyrights required by law to be preserved shall be kept and preserved in the Copyright Office, Library of Congress, District of Columbia, and shall be under the control of the Register of Copyrights, who shall, under the direction and supervision of the Librarian of Congress, perform all the duties relating to the registration of copyrights.

[Sections 48-60. Omitted.]

Sec. 61. That the Register of Copyrights shall receive, and the persons to whom the services designated are rendered shall pay, the following fees: For the registration of any work subject to copyright, deposited under the provisions of this act, one dollar, which sum is to include a certificate of registration under seal: Provided, that in the case of photographs the fee shall be fifty cents where a certificate is not demanded. For every additional certificate of registration made, fifty cents. For recording and certifying any instrument of writing for the assignment of copyright, or any such license specified in section one, subsection (e), or for any copy of such assignment or license, duly certified, if not over three hundred words in length, one dollar; if more than three hundred and less than one thousand words in length, two dollars; if more than one thousand words in length, one dollar additional for each one thousand words or fraction thereof over three hundred words. For recording the notice of user or acquiescence specified in section one, subsection (e), twenty-five cents for each notice if not over fifty words, and an additional twenty-five cents for each additional one hundred words. For comparing any copy of an assignment with the record of such document in the Copyright Office and certifying the same under seal, one dollar. For recording the extension or renewal of copyright provided for in sections twenty-three and twenty-four of this act, fifty cents. For recording the transfer of the proprietorship of copyrighted articles, ten cents for each title of a book or other article, in addition to the fee prescribed for recording the instrument of assignment. For any requested search of Copyright Office records, indexes, or deposits, fifty cents for each full hour of time consumed in making such search: Pro-

vided, that only one registration at one fee shall be required in the case of several volumes of the same book deposited at the same time.

[Section 62. Omitted.]

Sec. 63. That all laws or parts of laws in conflict with the provisions of this act are hereby repealed, but nothing in this act shall affect causes of action for infringement of copyright heretofore committed now pending in courts of the United States, or which may hereafter be instituted; but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

Sec. 64. That this act shall go into effect on the first day of July, nineteen hundred and nine.

Approved March 4, 1909.

SECTION 2.—WHAT CONSTITUTES PUBLICATION?

Prefatory Note.—It is necessary to answer this question, because an author's rights in his unpublished literary productions are determined by the common law, whereas his rights in his published productions are determined wholly by statute. So long as a writing has not been published by the author or with his consent, he is given full protection by the common law. Once there has been a publication the common-law right is gone beyond recall. Thereupon unless the requirements of the copyright statute are complied with so that rights may arise thereunder, the author has no rights in his production. Any one may use it with impunity.

JEWELERS' MERCANTILE AGENCY, Limited, v. JEWELERS' WEEKLY PUB. CO. et al.

(Court of Appeals of New York, 1898. 155 N. Y. 241, 49 N. E. 872, 41 L. R. A. 846, 63 Am. St. Rep. 666.)

Appeal from Supreme Court, General Term, First Department.

Action by the Jewelers' Mercantile Agency, Limited, against the Jewelers' Weekly Publishing Company, now the Trades' Weekly Company, and others. From a judgment of the

General Term (32 N. Y. Supp. 41) affirming a judgment of the Special Term, defendants appeal. Reversed.

The judgment appealed from enjoined the defendant from making any use of the plaintiff's reference books or confidential sheets, and from copying, appropriating, printing, publishing, or using, in any way, information taken therefrom, or furnishing such information to others. The plaintiff, a domestic corporation, has, ever since its incorporation, in 1883, been engaged in the business of a mercantile agency, which consisted in obtaining information regarding the business, street addresses, kinds and extent of business, commercial standing and mercantile credit of individuals, firms, and corporations engaged in the jewelry trade in the United States and Canada. This information is printed twice a year in the form of a reference book. A duplicate of smaller form is also printed. The plaintiff also issues weekly a confidential sheet of changes and corrections. These books and confidential sheets are furnished and lent to subscribers subscribing therefor, upon a contract which [provided that the books were loaned to the subscribers and that all information was confidential].

The plaintiff's reference book in the larger form bears upon the cover thereof, distinctly printed, the statement: "This is the property of the Jewelers' Mercantile Agency, Limited. Confidential Reference Book." And within, conspicuously printed, appears the following: "This book is the property of the Jewelers' Mercantile Agency, Limited, and is held by ———, under agreement of ———, eighteen ———, with them." It does not appear that the reference book was confined exclusively to the jewelry trade, nor does it appear but that any one could obtain a copy of the same by subscribing for it according to the terms of such contract. The defendant is also a domestic corporation, organized in January, 1891. It took the business which had before been carried on by the defendant Rothschild, and earlier by both Rothschild and Ulmann. The defendant took and appropriated from the plaintiff's reference book certain material information therein contained, and made use of it in a publication of its own, which came into competition with the plaintiff's publication. It also appeared that on the 28th day of June, 1890, the plaintiff, in pursuance of the copyright laws of the United States, deposited in the Copyright Office, with the Librarian of Congress, the title of the plaintiff's book of July, 1890. And on the 28th day of June, 1890, the plaintiff, in further pursuance of said copyright law, deposited in the office of the librarian of congress two copies of said reference book. And the said plaintiff printed on the page following the title page in the said book of July, 1890, the following notice: "Entered according to the

act of Congress, in the year 1890, by the Jewelers' Mercantile Agency, Limited, in the office of the Librarian of Congress at Washington." The plaintiff, however, insists the copyright failed because of its omission to make publication of the reference book, and stands upon its common-law right that there has never been such a publication as to entitle the general public to the use of the book. The acts which defendant urges amounted to a publication were the delivery of the book to such subscribers as cared for it, and were willing to become parties to the contract, *supra*, and the deposit of two of the books in the Library of Congress.

PARKER, C. J.¹¹ (after stating the facts). Thus far in the progress of this suit the plaintiff has [not] succeeded in its attempt to convince the court that the original common-law right in the "reference books," so called, has not been divested, and, therefore, it is [not] entitled to invoke the restraining power of the court to prevent the defendant from using in any way any information obtained therefrom. To the claim of the defendant that the plaintiff divested itself of its common-law right by copyrighting the reference books pursuant to the provisions of the Revised Statutes of the United States, the plaintiff makes answer that it had not, in fact, perfected a copyright of the book, and, therefore, its common-law right remains. It is true that plaintiff recorded the title of the book before publication; caused a copyright notice to be printed on the title page, and then delivered to the Librarian of Congress two printed copies of the book, with the notice of copyright printed on the title page, in pursuance of the statute which requires that such a number of copies shall be delivered to the librarian within 10 days after publication. So far as the record discloses, therefore, it would necessarily appear to any one making an examination of it for the purpose of ascertaining whether the plaintiff had secured to itself the benefit of copyright as to the reference book, that it had succeeded. But the plaintiff insists that its attempt, or pretended attempt, to secure a copyright was ineffectual, because of the omission on its part to publish the reference book. * * *

No proposition is better settled than that a statutory copyright operates to divest a party of the common-law right. If then, what the plaintiff did amounted to such a publication of the reference book as was requisite in connection with the other steps taken to perfect a copyright, its common-law rights were divested, and its remedy against violators of the rights thus secured would have been by suit in the United States courts. But publication also operates to destroy the common-

¹¹ Parts of the opinion are omitted.

law rights, whether a copyright be secured or not. An invention, a painting, or a book is the property of its creator. He may keep it for his own exclusive use or enjoyment if he sees fit. The public has no greater right to it, however useful it may be, than it would have to any other part of his personal property. But, if he once publishes it, his property right in it is gone, and every one may make use of it. A person who writes a book may keep the manuscript without printing it, and prevent any one from seeing it. He may take a still further step, and cause the book to be printed, and then determine that it shall not be seen by the public, and store all the printed copies away, and still he has not made a publication of it within the meaning of the law. It continues to be his property, as he has not yet offered it to the public. If, while the books are thus stored away, a copy should be obtained surreptitiously, and printed, or should the author loan one of the books to a friend to read and return, and in that manner a copy of the book should fall into the hands of some one who should attempt to print it, the author would be entitled to restrain publication, for the reason that he had not undertaken to put within the reach of the general public such thoughts or facts as he may have expressed or stated in the book. Cases have arisen in which there was a private circulation for a restricted purpose, and the holding has been that it did not constitute a publication, as in *Prince Albert v. Strange*, 2 De Gex & S. 652. In that case it appeared that her majesty and the prince consort had given to a number of friends copies of prints and etchings made for their own amusement, and this was held a private circulation, and not a publication. Out of a few cases of the same general character seems to have grown the idea that it is possible for a man, by putting restrictions on the use of his books by subscribers, however numerous they may be, to retain in himself forever the common-law right of first publication. If that position be sustained by the judgment of the courts, then will have been obtained judicial legislation of far broader scope and much greater value to authors and others than that offered by the copyright statute. * * *

Plaintiff's position, therefore, in effect is that a distinction should be drawn between selling or giving a book away and leasing it; that to offer to sell a book to the public or give it to public libraries, where all the public may have access to it, is to publish it; but to lease it to such of the public as care for it is not to publish it. The latter is certainly an effective method of putting the contents of the book in the possession of such portions of the public as desire it. By this method a party parts with the secret in such a way that the public may know it, provided the individuals composing such public are

willing to become subscribers, and lease the book. And, if leasing books to the public generally does not constitute a publication of them, then an author or publisher would have but to extend the period of leasing from 1 year to 99 or 999 years, as is the case in certain leasings of railroads, in order to secure almost as many lessees as there would be purchasers if the books were offered for sale. The buyer of the average book would be quite content with a restrictive title, which, nevertheless, assures him the possession of a book for either of the periods mentioned. It has not hitherto been understood to be the law that the common-law right could be so utilized as to secure to an author or publisher a continuing revenue from the public for a much longer period of time than congress has been willing to grant to him the exclusive right to publish. * * *

It will be observed that the general rule which we have quoted from Coppinger asserts, first, that to expose for sale is to constitute publication. It is not necessary that the book be actually sold; it is sufficient if it be offered to the public. The act of publication is the act of the author, and cannot be dependent upon the act of the purchaser. The actual sale of a copy is evidence that it has been offered to the public, but that fact may also be shown by other evidence. It then asserts that, if a book be offered gratuitously to the general public, it will constitute publication. This may be done by presenting it to public libraries, and this is so because the author or publisher, by that act, puts it in such a place that all the public may see it if they choose. The reason why exposing for sale or offering gratuitously to the general public constitutes publication is stated in the last part of the rule as follows: "So that any person may have an opportunity of enjoying that for which copy-right is intended to be secured." And this reason, which lies at the foundation of all decisions upon this subject, is applicable to this situation. All persons were given the opportunity of enjoying this book upon the plaintiff's terms. * * *

It was the privilege of any and all persons who desired to become subscribers to obtain possession and use of the reference books. The fact that the publisher of the book undertook to place restrictions on the use which individual purchasers could make of it, the effect of which might be to increase, rather than diminish, the public demand for the book, does not constitute such a limitation as takes away from the act of the plaintiff its real character, which is that of publication. * * *

But our examination leads us to the conclusion that the present state of the law is that, if a book be put within reach of the general public, so that all may have access to it, no matter what limitations be put upon the use of it by the individual subscriber or lessee, it is published, and what is known as the

common-law copyright, or right of first publication, is gone. So far as is disclosed by this record, the plaintiff was in that situation at the time of the commencement of this action. The judgment should be reversed, and a new trial granted, with costs to abide the event.

GRAY, O'BRIEN, and HAIGHT, JJ., concur; and BARTLETT, MARTIN, and VANN, JJ., concur for reversal upon special grounds. * * *

Judgment reversed.¹²

BARTLETT v. CRITTENDEN et al.

(Circuit Court, D. Ohio, 1849. 5 McLean, 32, Fed. Cas. No. 1,076.)

THE COURT.¹³ This bill is brought to protect the copyright of the complainant, in a manuscript work on book-keeping, of which he claims to be the author; and the defendant is alleged to have published a work on the same subject, which the complainant charges was copied from his manuscript. For twelve years and upwards, the complainant has been engaged in teaching the art of keeping books, and has used his work, which is still in manuscript, in his school, with the view of rendering it more perfect, and with the intention of publishing it. The work of the defendant contains two hundred and seven pages, ninety-two of which are alleged to have been taken from the plaintiff's manuscript [copies of which the defendant made while he was a student in the plaintiff's school], with only colorable alterations. The answers deny the allegations in the bill.

A reference was made to a master, with special instructions, who reports, "that the book of the respondents contains a portion of plaintiff's manuscript, with only slight alterations; and he says that it is impossible that the book and the manuscript could have been composed by two persons, neither having for his guide the entries of the other. The balance sheets are the same in both. As regards the plan and arrangement, they are the same. The book contains explana-

¹² In this case the action was brought in a state court, as distinguished from a federal court. If the complainant's rights were of common-law origin, the state court had jurisdiction to hear the case; but if his common-law rights had been lost by having the book copyrighted, which included publication he could only assert his rights in the federal court. While thus a question of jurisdiction was involved, its solution depended upon whether the acts of the mercantile agency amounted to a publication of the book. It was held that they did. Hence his case should have been filed under the copyright statute in the federal court.

¹³ Parts of the opinion are omitted.

tions, which are valuable to the learner, that are not in the manuscript. Both works consist of a series of brief sets of mercantile books by double entry." The master reports, that the plan of the work in the manuscript and in print, is substantially the same; that in the book there are explanations interspersed through the series of sets, which the manuscript does not contain; that these explanations are of great use to the learner, but that they may be verbally given with equal advantage. The system in the manuscript, the master states, is superior to any he has seen, except that of the book published by the defendant, which is the same in substance, "that, unlike all the systems he had seen, the manuscript is made up of a few brief sets of mercantile books, which show the entire process of ordinary double entry bookkeeping, and in a compass of very little magnitude;" and he says, that "he discovers in other treatises nothing bearing a resemblance to the manuscript plan. He therefore concludes that the plan is original." "The manuscript, in its present state, (the master says,) contains substantially a system of book-keeping, suitable to be used by a teacher in his school." "As the system, when published, becomes its own teacher, it should be accompanied with such precise explanations as may be necessary to a proper understanding and use of it by the uninitiated. It should also be accompanied with forms of the auxiliary books." * * *

The complainant claims relief on two grounds: (1) At common law. (2) Under the Act of Congress of Feb. 3, 1831 [4 Stat. 438].

In the case of *Wheaton v. Peters*, 8 Pet. [33 U. S.] 655, the Supreme Court say: "That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted." And again, page 661: "An author has, by the common law, a property in his manuscript; and there can be no doubt that the rights of an assignee of such manuscript would be protected by a court of chancery." In combating the argument in the same case, that an author had a common law right to republish his own works, and to prohibit others from doing so, the court showed that after the statute of Anne there was no such right in England, and that if such right were shown to exist there, it did not follow that it exists to the same extent in Pennsylvania. That the common law in this country exists in the different states, as modified by them by statutory enactments and judicial decisions.

But the question under consideration is very different from the one decided in the above case. We have to say whether

the writer has a right of property in his own manuscripts. That he has such a property in his own literary labor, until he shall relinquish it by contract or by some unequivocal act, would seem to be clear. * * * His manuscripts, however valuable, cannot, without his consent, be seized by his creditors as property. They are valueless to all the world except to the author and his representatives; or to such persons as he shall transfer them. But the author who publishes his work, dedicates it to the public. He voluntarily incurs all the responsibility of a publisher. His object is to instruct or amuse mankind, and the more his work is circulated, the greater is the compliment to his ability as a writer. There is no reason, then, against a republication of the work by any one, except that it may reduce the profits of the author. And, on this ground, he cannot complain, as he has failed to secure the right under the statute. If the common law protects the rights of an author, as contended for, the statute was useless. An action for damages and an injunction, would as effectually protect the rights of an author, as any provisions of the statutes.

But there is another view, which is still more conclusive, against the exclusive right to republish a printed work. The statute limits the right to a term of years. The common law right, if it exist, is without limitation. To hold, then, that there is a common law right, independently of the statute, is to disregard the statute. Whilst the common law protects the right of the author to his manuscripts, it cannot be made to extend to the republication of a published work. As well might it be contended that the inventor of a machine, after it has gone into general use, by the acts of the inventor, may, by the common law, claim the exclusive right of making and selling it. But we think this case is within the act of congress referred to. The section 9 of that act—4 Pet. St. 438 [4 Stat. 438]—provides: "That any person or persons who shall print or publish any manuscript whatever, without the consent of the author or legal proprietor first obtained, shall be liable to suffer, and pay to the author or proprietor, all damages occasioned by such injury, to be recovered by a special action on the case founded on this act." "And the several courts of the United States empowered to grant injunction to prevent the violation of the rights of authors and inventors, are hereby empowered to grant injunctions," etc. * * *

Was there a publication of the manuscript of the complainant by the defendant? He has denied in his answer, somewhat equivocally, the charge of publication, as made in the bill. He confessed to Jones that he took a copy of the manuscript, with a view of publishing it, and that he did publish it

in 1845. After the publication of his book, he admitted, to other witnesses, that the system of his work was the same as Bartlett's. It seems Crittenden became a student in the school of Bartlett and Jones, conducted by Jones at St. Louis, and in which he acquired his knowledge of book-keeping. The manuscript of Bartlett was used in that school, and it was there that the defendant made out his copy. * * *

It is argued, to bring the case within the ninth section, that the whole of any manuscript must be published; that the principle of law in relation to colorable alterations of a printed book, or a fair abridgment of it, does not apply under this section to a manuscript. If the whole of the manuscript must be published, will the omission of a line or a word, evade the statute? That it will, would seem to be the argument of the counsel. Under such a construction, the question might well be asked, of what value to an author is the statute? It purports to protect him against a fraudulent use of his manuscript; but practically it gives him no protection. It has been passed in mockery of his right. He is the sport of every man who has the disposition and the opportunity to pirate his manuscript. No such rule of construction is admissible. Has a substantial part of the manuscript been published? Does the book of the defendant contain Bartlett's system of book-keeping? Of this there can be no doubt. Such a publication is within the above section. It renders the manuscript valueless.

Was there an abandonment of the manuscript by Bartlett? This is the only remaining point to be considered, and it is the one most relied on in the defence. It satisfactorily appears from the evidence, that Bartlett intended to publish his manuscript. And this is only material on the question of abandonment. His right of property in no way depends on his intention in this respect. His manuscript was used in the school taught by himself in Cincinnati, and by the partnership school taught by Jones in St. Louis. In both these schools the manuscript was studied by the pupils, and they were required to copy certain parts of it, and were at liberty to copy the whole. These schools, and especially the one at Cincinnati, have been in operation several years. And under these circumstances, it is contended, there was an abandonment of the manuscript.

Bartlett's right of property in his manuscript may be transferred or abandoned, the same as any other right of property. Where the copyright of a published work is secured, under the statute, the author, by using the work in imparting instruction to his pupils, or by disposing of it to a friend, does not thereby transfer his exclusive right to publish it, or incur a suspicion that he intends to abandon it. And how does this

differ from the case under consideration? In both cases the law gives a right of property to the author, and a remedy to enforce that right. And in both cases he may transfer or abandon that right. The evidence of a transfer or abandonment must be as clear and as specific in the one case as in the other. An acquiescence in the publication of his manuscript, or in the republication of his printed book, would authorize the presumption of an assignment or of an abandonment. To make a gift of a copy of the manuscript is no more a transfer of the right or abandonment of it, than it would be a transfer or an abandonment of an exclusive right to republish, to give the copy of a printed work.

In his treatise on Equity, (section 943,) Mr. Justice Story says, "In cases of literary, scientific, and professional treatises in manuscript, it is obvious, that the author must be deemed to possess the original ownership, and be entitled to appropriate them to such uses as he shall please. Nor can he justly be deemed to intend to part with that ownership by depositing them in the possession of a third person, or by allowing a third person to take and hold a copy of them. Such acts must be deemed strictly limited, in point of right, use, and effect, to the very occasions expressed or implied, and ought not to be construed as a general gift or authority for any purposes of profit or publication, to which the receiver may choose to devote them." And he says, to prevent the publication of manuscripts, without the consent of the author, an injunction should be issued. Even the publication of private letters by the person to whom they were addressed, may be enjoined. This is done upon the ground that the writer has a right of property in his letters, and that they can only be used by the receiver for the purposes for which they were written. So far as this, and, in justification or defense, an individual has an interest in letters received by him. *Eden, Inj. c. 13, pp. 275, 276; Duke of Queensberry v. Shebbeare, 2 Eden, 329; Southey v. Sherwood, 2 Mer. 435, 436; Macklin v. Richardson, Amb. 694; Pope v. Curl, 2 Atk. 342; Lord Perceval v. Phipps, 2 Ves. & B. 19, 24; Gee v. Pritchard, 2 Swanst. 403, 415, 422, 425.* "No length of time will authorize the publication of an author's original manuscript without his consent."

In 1804, the Court of Sessions of Scotland interdicted, at the instance of the children, the publication of the manuscript letters of the poet Burns. *Cadell v. Stewart, 1 Bell, Comm. 116n.* Lectures, oral or written, cannot be published without the consent of the lecturer, though taken down when delivered. Manuscript reports were copied by the clerk of a gentleman, to whom the author had lent them, and the chancellor

granted an injunction to restrain the publication. *Forrester v. Waller*, 2 Eden, 328; Eden, Inj. 322. The Earl of Clarendon delivered to defendant's ancestor, the manuscript of the second part of his father's *History of the Rebellion*, with liberty to take a copy of it, and make what use of it he thought fit. Complainant, who was Lord Clarendon's representative, obtained an injunction from Lord Northington, who said, that it could not have been the donor's intention that the donee should print the work, though he might make every use of it except that. *Duke of Queensberry v. Shebbeare*, 2 Eden, 329. Lord Eldon refused to grant an injunction, until the right was tried at law, where the manuscript had been in the hands of a publisher twenty-three years, and had not been called for by the plaintiff. *Southey v. Sherwood*, 2 Mer. 435.

Sparks had procured, from the representatives of Washington, the right of publishing his letters and other writings, and had done so in twelve volumes. Upham, in his *Life of Washington*, had taken many of these letters from Sparks, they never having been published before. On a bill filed, Mr. Justice Story said: "Unless there be a most unequivocal dedication of private letters and papers by the author, either to the public or some private person, I hold that the author has a property therein, and that the copyright thereof exclusively belongs to him." And he granted an injunction. *Folsom v. Marsh* [Case No. 4,901]. The manuscript of Bartlett was used in his school at Cincinnati, and in the school at St. Louis, for the purpose of imparting instruction to the pupils, and it does not appear, from the evidence that copies were required or permitted to be taken of it for any other purpose. There is nothing in the testimony from which an implication can arise, that Bartlett consented to the publication of his manuscript by the defendant, or that he ever abandoned it. It seems he was much excited when he was informed of the publication of Crittenden, and, shortly afterwards, instituted this suit.

An injunction will be granted to restrain the defendants from a further publication of the first 92 pages of the work, or sale of it; and a reference is made to a master to ascertain the number of copies sold, and the number on hand, &c., and that he report at the next term.¹⁴

¹⁴ No attempt had been made by the author of the manuscript to have it copyrighted. His rights, therefore, could be asserted, if at all, only under the common law. Whether his common-law right remained depended upon whether his use of the manuscript in giving instruction had constituted a publication of it. It was held that it did not. A decree was therefore entered against the defendant.

HOLMES v. HURST.

(Supreme Court of the United States, 1899. 174 U. S. 82, 19 Sup. Ct. 606, 43 L. Ed. 904.)

This was a bill in equity by the executor of the will of the late Dr. Oliver Wendell Holmes, praying for an injunction against the infringement of the copyright of a book originally published by plaintiff's testator under the title of "The Autocrat of the Breakfast Table."

The case was tried upon an agreed statement of facts, the material portions of which are as follows:

Dr. Holmes, the testator, was the author of "The Autocrat of the Breakfast Table," which, during the years 1857 and 1858, was published by Phillips, Sampson & Co., of Boston, in 12 successive numbers of the Atlantic Monthly, a periodical magazine published by them, and having a large circulation. Each of these 12 numbers was a bound volume of 128 pages, consisting of a part of "The Autocrat of the Breakfast Table," and of other literary compositions. These 12 parts were published under an agreement between Dr. Holmes and the firm of Phillips, Sampson & Co., whereby the author granted them the privilege of publishing the same, the firm stipulating that they should have no other right in or to said book. No copyright was secured, either by the author or by the firm or by any other person, in any of the 12 numbers so published in the Atlantic Monthly; but on November 2, 1858, after the publication of the last of the 12 numbers, Dr. Holmes deposited a printed copy of the title of the book in the clerk's office of the District Court of the District of Massachusetts, wherein the author resided, which copy the clerk recorded. The book was published by Phillips, Sampson & Co. in a separate volume on November 22, 1858, and upon the same day a copy of the same was delivered to the clerk of the district court. The usual notice, namely, "Entered according to act of congress, 1858, by Oliver Wendell Holmes, in the clerk's office of the District Court of the District of Massachusetts," was printed in every copy of every edition of the work subsequently published, with a slight variation in the edition published in June, 1874.

On July 12, 1886, Dr. Holmes recorded the title a second time, sent a printed copy of the title to the Librarian of Congress, who recorded the same in a book kept for that purpose, and also caused a copy of this record to be published in the Boston Weekly Advertiser; and in the several copies of every edition subsequently published was the following notice: "Copyright, 1886, by Oliver Wendell Holmes."

Since November 1, 1894, defendant has sold and disposed of

a limited number of copies of the book entitled "The Autocrat of the Breakfast Table," all of which were copied by the defendant from the 12 numbers of the Atlantic Monthly exactly as they were originally published, and upon each copy so sold or disposed of a notice appeared that the same was taken from the said 12 numbers of the Atlantic Monthly.

The case was heard upon the pleadings and this agreed statement of facts by the circuit court for the Eastern district of New York, and the bill dismissed [i. e., judgment was given for the defendant]. 76 Fed. 757. From this decree an appeal was taken to the Circuit Court of Appeals for the Second Circuit, by which the decree of the Circuit Court was affirmed. 51 U. S. App. 271, 25 C. C. A. 610, and 80 Fed. 514. Whereupon plaintiffs took an appeal to this court.

Mr. Justice BROWN,¹⁵ after stating the facts in the foregoing language, delivered the opinion of the court.

This case raises the question whether the serial publication of a book in a monthly magazine, prior to any steps taken towards securing a copyright, is such a publication of the same, within the meaning of the act of February 3, 1831, as to vitiate a copyright of the whole book, obtained subsequently, but prior to the publication of the book as an entirety. * * *

The right of an author to control the publication of his works at the time the title to the "Autocrat" was deposited was governed by the Act of February 3, 1831 (4 Stat. 436), wherein it is enacted:

"Section 1. That from and after the passing of this act, any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of a book or books, map, chart or musical composition, which may be now made or composed, and not printed and published, or shall hereafter be made or composed, * * * shall have the sole right and liberty of printing, reprinting, publishing and vending such book or books, * * * in whole or in part, for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed."

"Sec. 4. That no person shall be entitled to the benefit of this act, unless he shall, before publication, deposit a printed copy of the title of such book or books¹⁶ * * * in the clerk's office of the District Court of the District wherein the author or proprietor shall reside, etc. And the author and proprietor of any such book * * * shall, within three months from the publication of said book, * * * deliver or

¹⁵ Parts of the opinion are omitted.

¹⁶ The present act provides for publication first, followed by deposit.

cause to be delivered a copy of the same to the clerk of said district."

The substance of these enactments is that by section 1 the author is only entitled to a copyright of books not printed and published, and by section 4 that, as a preliminary to the recording of a copyright, he must, before publication, deposit a printed copy of the title of such book, etc.

The argument of the plaintiff in this connection is that the publication of the different chapters of the book in the *Atlantic Monthly* was not a publication of the copyright book, which was the subject of the statutory privilege; that if Dr. Holmes had copyrighted and published the 12 parts, one after the other, as they were published in the magazine, or separately, there would still have remained to him an inchoate right, having relation to the book as a whole; that his copyright did not cover and include the publication of the 12 parts printed as they were printed in the *Atlantic Monthly*; and that, while the defendant had a right to make copies of those parts and to sell them separately or collectively, he had no right to combine them into a single volume, since that is the real subject of the copyright. * * *

If an author permit his intellectual production to be published either serially or collectively, his right to a copyright is lost as effectually as the right of an inventor to a patent upon an invention which he deliberately abandons to the public, and this, too, irrespective of his actual intention not to make such abandonment. It is the intellectual production of the author which the copyright protects, and not the particular form which such production ultimately takes; and the word "book," as used in the statute, is not to be understood in its technical sense of a bound volume, but any species of publication which the author selects to embody his literary product. We are quite unable to appreciate the distinction between the publication of a book and the publication of the contents of such book, whether such contents be published piecemeal or en bloc.

If, as contended by the plaintiff, the publication of a book be a wholly different affair from the publication of the several chapters serially, then such publication of the parts might be permitted to go on indefinitely before a copyright for the book is applied for, and such copyright used to enjoin a sale of books which was perfectly lawful when the books were published. There is no fixed time within which an author must apply for a copyright, so that it be "before publication," and, if the publication of the parts serially be not a publication of the book, a copyright might be obtained after the several parts, whether published separately or collectively, had been in gen-

eral circulation for years. Surely, this cannot be within the spirit of the act. Under the English copyright act of 1845, provision is made for the publication of works in a series of books or parts, but it has always been held that each part of a periodical is a book within the meaning of the act. *Henderson v. Maxwell*, 4 Ch. Div. 163; *Bradbury v. Sharp*, [1891] Wkly. Notes, 143.

We have not overlooked the inconvenience which our conclusions will cause, if, in order to protect their articles from piracy, authors are compelled to copyright each chapter or installment as it may appear in a periodical; nor the danger and annoyance it may occasion to the librarian of congress, with whom copyrighted articles are deposited, if he is compelled to receive such articles as they are published in newspapers and magazines; but these are evils which can be easily remedied by an amendment of the law.

The infringement in this case consisted in selling copies of the several parts of "The Autocrat of the Breakfast Table" as they were published in the *Atlantic Monthly*, and each copy so sold was continuously paged so as to form a single volume. Upon its title page appeared a notice that it was taken from the *Atlantic Monthly*. There can be no doubt that the defendant had the right to publish the numbers separately as they originally appeared in the *Atlantic Monthly* (since those numbers were never copyrighted), even if they were paged continuously. When reduced to its last analysis, then, the infringement consists in binding them together in a single volume. For the reasons above stated, this act is not the legitimate subject of a copyright.

The decree of the court below [which was for the defendant] must therefore be affirmed.

SECTION 3.—WHAT WRITINGS ARE COPYRIGHT- ABLE?

WALTER v. LANE.

(Supreme Court of Judicature, Chancery Division. [1899]
2 Ch. Div. 749.)

This was a motion by the proprietors of the *Times* newspaper for an interim injunction to restrain the defendant from infringing their copyright by publishing or selling a book called "Appreciations and Addresses Delivered by Lord Rosebery," containing copies of some articles or reports which had been

published in the *Times*, or any substantial portions thereof, or extracts therefrom. During the years 1896 and 1898 reporters on the staff of the *Times* attended and composed inscriptions of meetings on various occasions, including verbatim reports of speeches delivered by Lord Rosebery. These were published in the *Times* under the titles "Lord Rosebery on Free Libraries," a speech which had been made at the opening of the Passmore Edwards Library on June 25, 1896; "Lord Rosebery and Sir Walter Besant on London," at a meeting held on December 7, 1896; "Lord Rosebery on Great Britain and America," at a lecture delivered on July 7, 1898; "Lord Rosebery on Burke," at the unveiling of a memorial on July 9, 1898; and "Etonian Dinner—Lord Rosebery and Lord Curzon," at a dinner which took place on October 28, 1898.

The defendant published a book called "Appreciations and Addresses delivered by Lord Rosebery," which contained practically verbatim copies of the reports in the *Times* of these given speeches. He admitted that he had used cuttings from the *Times*, but he alleged that the proofs of the book were corrected, with Lord Rosebery's consent, by a comparison with a book of his speeches revised by himself. This book was a collection of newspaper cuttings, and in four of the articles in question the *Times* reports had not been altered in any way.

The proprietors of the *Times* brought this action, claiming a declaration that they were entitled to the copyright of the articles or reports in question, and an injunction to restrain the defendant from further publishing any book containing copies of them. The reporters had assigned such copyright as they had to the plaintiffs. One of them (a barrister) made an affidavit, in which he stated that he had composed or assisted in composing four of the reports the subject of the action, and he added: "In the course of our duty the reporters of the *Times* have to exercise their judgment and skill so as to represent in a form fit for publication the features of the meetings, and the material parts of and the sense of the speeches made at them. This involves considerable skill and labour. Notes of the proceedings and speeches are taken in shorthand, which are afterwards carefully corrected and revised and written out, and punctuated fit for publication. This was the course of procedure in the cases of the reports" in question.

Lord Rosebery made no claim to copyright in any of the speeches, and had not taken the necessary steps to secure the copyright to himself.

The motion came on for hearing before North, J., on July 14, 1899.

Birrell, Q. C., in reply. Possibly there may be copyright in the work of a reporter who publishes a condensed report,

giving the sense and effect of a speech with his own choice of words. That may be a composition; but here the reporter performed the merely mechanical operation of taking down the precise words used by the speaker. As to the necessity of the reporter having preliminary skill and training, the same may be said, though in a lesser degree, of a mere copyist. It is submitted that neither transcribing nor copying can make a man an "author" within the act. Authorship involves some literary work—that is, comparing sentences and words—but it does not apply to a verbatim report. The work here, so far as it is a composition, is not the work of the reporter: it is "the work of the brain and the composition of" Lord Rosebery. *Lamb v. Evans*, [1892] 3 Ch. 462, 467.

LINDLEY, M. R.,¹⁷ read the judgment of the court (LINDLEY, M. R., Sir F. H. JEUNE, and ROMER, L. J.), in which (after stating the facts) he continued:

The case turns on the true construction of the Copyright Act of 1842. That act defines "copyright" and "book" (by section 2), and confers copyright on every "author" of a book and his assigns (by section 3). Periodical publications are dealt with in section 18. The act contains no definition of "author," but it confers copyright on the authors of books first published in this country. * * * Section 18 of the act refers to copyright in what is printed in newspapers and periodical publications. Unless otherwise agreed, the copyright in such matter belongs to the author. But the publisher or proprietor of the newspaper, etc., can himself obtain the copyright in any article published in the newspaper, etc., if he employs some one to "compose" what is published on the terms that the copyright shall belong to the publisher or proprietor. The word "compose" here cannot mean copy or write from dictation; it obviously means compose in the sense of being the author of the matter published. This is made perfectly clear by the language of the provisos, which prevent the publisher or proprietor of the newspaper, etc., from publishing the article in a separate form without the consent of the "author," and entitle the author to publish it himself in a separate form. The "author" here is the person employed to "compose" the article. The more closely the act is studied the more clearly it appears that, in order that the first publisher of any composition may acquire the copyright in it, he must be the "author" of what he publishes, or he must derive his right to publish from the author by being the owner of his manuscript, or in some other way.

¹⁷ The opinion of North, J., and part of the opinion of Lindley, M. R., are omitted.

It was contended, and North, J., took the view that, although the reporter had no copyright in the speech, he was entitled to copyright in his report of it. But we cannot follow this. The report and the speech reported are, no doubt, different things, but the printer or publisher of the report is not the "author" of the speech reported, which is the only thing which gives any value or interest to the report. The printer or reporter of a speech is not the "author" of the reported speech in any intelligible sense of the word "author." To hold that every reporter of a speech has copyright in his own report would be to stretch the Copyright Act to an extent which its language will not bear, and which the Legislature obviously never contemplated. The act was passed to protect authors, not reporters. Moreover, although it may be that reporters and their employers ought to be protected from the unauthorized appropriation of their labours by others, it by no means follows that Parliament would place reporters and their employers on the same footing as authors. It is only by treating reporters as authors of what they report—which they clearly are not—that they can be brought within the existing Copyright Act. Although we have no sympathy with the defendant, we are quite unable to decide in favour of the plaintiffs. Plausible as are the arguments addressed to the court on their behalf, those arguments are all based on the untenable doctrine that, for the purposes of copyright, reporters are authors.

The analogy of directories, road books, maps, etc., is, in our opinion, wholly misleading. There, each man who himself makes a directory, etc., and publishes it is the author of what he publishes. The reporter of a speech is not. The distinction is all-important, but it is only by wholly ignoring it that the decisions on directories, etc., can be invoked by the plaintiffs. If the reporter of a speech gives the substance of it in his own language: if, although the ideas are not his, his expression of them is his own and not the speaker's, with immaterial differences, the reported speech would be an original composition, of which the reporter would be the author, and he would be entitled to copyright in his own production. This is the ground on which copyright in law reports is based. They are by no means mere transcripts of judgments delivered in court. But we have not to deal with speeches recast by the reporter. He has reproduced to the best of his ability not only the ideas expressed by the speaker, but the language in which the speaker expressed those ideas. In other words, we are dealing with the most accurate report of the speaker's words which the reporter could make. No doubt it requires considerable education and ability to make a good report of any speech. But an accurate report is not an original composition, nor is the re-

porter of a speech the author of what he reports. The appeal must be allowed, and the action dismissed with costs here and below.¹⁸

J. H. WHITE MFG. CO. v. SHAPIRO.

(District Court of the United States, S. D. New York, 1915.
227 Fed. 957.)

In Equity. Suit by the J. H. White Manufacturing Company against Samuel Shapiro. On motion to dismiss bill. Motion sustained, with leave to amend.

AUGUSTUS N. HAND, District Judge. Complainant copyrighted its catalogue of brass goods, which consisted principally of trimmings for electric light fixtures. Defendant is charged with copying in his catalogue several of the designs for these trimmings, and with thus infringing complainant's copyrighted catalogue.

Defendant moves to dismiss the bill of complaint upon ground (f), among others, which is that the catalogue appears to be merely a trade list of articles of general merchandise, and as such not a proper subject for copyright protection under the law. In *Da Prato Statuary Co. v. Giuliani Statuary Co.* (C. C.) 189 Fed. 90, it was held that a catalogue containing illustration of articles for the decoration of churches might be copyrighted. A similar conclusion was reached by Judge Witmer in *National Cloak & Suit Co. v. Kaufman* (C. C.) 189 Fed. 215, in regard to a catalogue containing pictures of women's gowns manufactured by the complainant showing the latest fashions. Mr. Justice Holmes in *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 23 Sup. Ct. 298, 47 L. Ed. 460, speaking for the majority of the Supreme Court, sustained a copyright upon advertisements of a circus which were pictorial illustrations of the performers. In the cases of *Lamb v. Grand Rapids School Furniture Co.* (C. C.) 39 Fed. 474, and *J. L. Mott Iron Works v. Clow* (C. C.) 72 Fed. 168, it was held that pictorial illustrations of furniture and artistic plumbing fixtures in a catalogue for use in advertising were not subjects of copyright.

These decisions certainly are not without much basis in reason; but I cannot see that the distinction made by them in respect to catalogues for advertising is warranted by the strict language of the statute, and the case of *Bleistein v. Donald-*

¹⁸ The final decision was thus for the defendant. See "The Scope of the Law of Copyright," 4 *Virginia Law Rev.* 385, dealing with the subject of this section.

Immoral writings cannot be copyrighted. *Broder v. Zeno Mauvais Music Co.* (C. C.) 88 Fed. 74 (1898).

son Lithographing Co., *supra*, though concurred in by only seven Justices, with a dissent by Harlan and McKenna, JJ., is binding upon me, and makes it necessary to sustain the copyright upon this motion. Section 4952 of the Revised Statutes provides that: "The author, inventor, designer, or proprietor of any * * * engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, * * * shall * * * have the sole liberty of printing, reprinting, publishing, * * * and vending the same."

Neither the merit nor purpose of the print seems to be regarded by the language of the act. It is to be remembered that the defendant may make his own print of the original. He is only precluded from copying the complainant's illustration, as he is charged with having done. If he has not done this, the suit cannot be sustained. If he has done so, the complainant may well say, in the language of Mr. Justice Holmes in the *Bleistein Case*, *supra*, at page 252 of 188 U. S., at page 300 of 23 Sup. Ct. (47 L. Ed. 460): "That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights."

The complainant can doubtless amend its bill of complaint, so as to obviate the technical objections (b), (c), and (d), and the bill will then state a good cause of action. The objection (e), that the complainant has not filed a copy of its catalogue, is now cured.

Upon the case as it stands, the motion to dismiss should be granted on these grounds, and denied as to the ground (f), which I have discussed, unless the complainant shall file an amended bill of complaint within 20 days.

SECTION 4.—WHAT CONSTITUTES INFRINGEMENT?

WEST PUBLISHING CO. v. EDWARD THOMPSON CO.

(Circuit Court of the United States, E. D. New York, 1909.
169 Fed. 833.)

CHATFIELD, District Judge.¹⁹ * * * It may be taken as a premise that the right given to an author to multiply copies, and to prevent the appropriation of the copyrighted material by other persons, which is granted by section 4952 of the Revised Statutes (U. S. Comp. St. 1901, p. 3406), includes

¹⁹ Parts of the opinion are omitted.

the right to recover damages where the damages can be proven, and to injunction where an injunction is the appropriate or necessary remedy, and such remedies are provided for by the statutes themselves, in sections 4967 and 4970 (U. S. Comp. St. 1901, p. 3416).

The earliest copyright law in the United States was passed in 1790, and it is unnecessary to trace the variations in the language of the statute upon this point, for the statutes have uniformly provided for the propositions just stated. The principles of copyright, and the awarding of damages and of equitable remedies, need no citation of cases.

A direct inference from the right itself is the liability incurred where literal copying is avoided, and mere paraphrasing or avoidance of the appearance of copying is obtained, while an appropriation of the subject-matter is had. In the case of *Lawrence v. Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136, such paraphrasing was held within the provisions of the statute, and actionable the same as copying. Such paraphrasing, or such taking of material, can be proven in two ways, either by internal evidence, depending upon the sequence of ideas and language in such numbers as inevitably compels the conclusion that the copyrighted work was the source of the infringing publication, or direct testimony as to the manner in which the work was done. In the present case, both lines of proof have been followed, and the issue of copying, in the form of paraphrasing as well as literal abstraction of consecutive words, has comprised a large part of the record in the case.

Actual copying, or such paraphrasing as to be equivalent to copying, was at first considered to be the only form of infringing use of copyrighted material. But the great diversity of printed publications, and the many phases of literary activity, especially when applied to minor pursuits, ultimately forced the construction of the copyright statute, in which the basis of injury is found in the unfair use of the material of the work in making up a book of similar nature, as well as in a direct copying or paraphrasing of the words therein contained. This extension of the law of copyright brings the case closely into the realm of unfair competition. But, while a likeness may be traced in the principles upon which this class of actions is founded, yet, in application and in scope a sharp line of distinction can be drawn. Copyright is based upon statute, while unfair competition (except as it may be affected by legislative enactment, in connection with patents, trade-marks, etc.) is dependent upon abstract principles of law. Copyright relates to the printed material of a publication, while unfair competition may be concerned with any article of trade,

whether having words or letters in its composition and appearance or not. * * *

"What Constitutes Infringement of Copyright?

"1. Infringement consists of the violation of the exclusive right conferred by the statute.

"2. The exclusive right conferred by the statute is 'the sole liberty of printing, reprinting, publishing * * * and vending' the copyrighted matter; i. e., the exclusive right of multiplying copies.

"3. Hence, there can be no infringement of copyright unless there has been copying, either in whole or in part of the copyrighted work.

"1. Copying consists in the exact or substantial reproduction of an original, using such original as a model, as distinguished from an independent production of the same thing.

"2. Two copies of a common original are not copies of each other, though identical.

"3. Hence, a book written from the original sources—i. e., cases—is not a copy of another book written from the same sources, even though such book is used to point the way to such original sources, such use being the only use made of such other book.

"Common Use.

"1. The public are entitled to make any use of a copyrighted book which does not amount to a violation of the exclusive right given by the statute.

"2. Anything less than a substantial copy of the whole or a material part of the book does not violate the exclusive right given by statute (99 U. S. 675), (and first syllogism supra).

"3. Hence, any one may copy less than a material part of a copyrighted book; i. e., he may make a fair use of it.

"Conclusions.

"The law upon the subject of infringement of copyright is as follows:

"1. There must be some copying in order to constitute infringement. If there is no copying there is no infringement, and the question of fair or unfair use does not arise.

"2. Even where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent. It is only after copying has been shown that the question of fair or unfair use arises, and then it is controlling. Several classes of cases of copying have been

held to be fair and hence not an infringement, such as 'fair quotation,' 'extracts for comment and criticism,' 'bona fide abridgments,' etc. Perhaps others will be recognized when they arise. Each case depends upon its particular circumstances.

"3. The use of a copyrighted book merely as a means of reference to the original cases does not constitute copying, and hence is not an infringement, and hence does not present any question of fair or unfair use. All uses of a book are dedicated to the public by publication, except such as are reserved by the statutes.

"4. Of course, a copy of an original is none the less a copy because its references have been verified by subsequent resort to the original sources. But the use of the original as a means of reference to the original sources, from which the book is subsequently written, is more than mere verification, and is not copying.

"5. So there may be copying without any verbal identity. This would occur if a proposition were reproduced from a copyrighted book without independently producing it from the original source.

"April 30, 1903.

W. B. Hale.

"Paraphrasing is Copying.

"Infringement of Copyright in Legal Works.

"1. If I reproduce the propositions of law from a previous work, using the same or different language, without independently producing the proposition, I have copied it, and therefore have infringed.

"2. If I append to the propositions of law so copied the lists of cases cited in the original work in support of said propositions, without examining the cases, in the reports, I have copied them and have infringed.

"3. If I reproduce the propositions and cases as above, but also examine the cases in the reports, I have made a verified copy; but it is still a copy, and hence an infringement.

"4. If I publish a list of cases cited in the previous work, but without reproducing the propositions to which they are cited, I have not infringed, although I have copied every case cited in the book, because there can be no copyright in the mere names of cases apart from the propositions of law which the cases support. It is not a 'copy' because it does not convey the same information.

"5. If I take a list of cases from a previous work, then examine the original reports, and deduce for myself from the reports the propositions which the cases support, and cite the cases in support of such propositions, I have copied nothing

and have not infringed. The information conveyed is not derived from the previous work, but from the reports. The correlation of the cases with the propositions is not taken from the original work, but is independently produced. As the names of cases appear in the subsequent work, they are not copied from the original work, but are copied from the reports, which are the common and original source.

"6. In all cases of compilation, a distinction must be drawn between verifying a copy and making an original compilation. The first constitutes an infringement; the latter does not, though the resulting product is exactly the same. The fact that it requires as much labor and expense to make a verified copy as to make an original compilation is wholly immaterial."

It may be observed that substantially each of the propositions set forth by Mr. Hale in this document is a correct deduction of the law, but that the application of the propositions is open to argument; and the determination of the questions of fact raised by the propositions, in most instances, will substantially determine the questions at issue in this portion of the case. For instance, Mr. Hale states that there can be no infringement of copyright, unless there has been copying. The question to be determined is: What will be held to be "copying," rather than any dispute as to the effect of such copying, if the question has been answered and copying has been found?

The discussion of the cases which has previously been made in this opinion shows that with respect to the use of copyrighted legal publications the courts have included, within the term "copying," not only paraphrasing, but also the appropriation of the literary work, labor, and ideas of another, and that this includes arrangement and selection, as well as mere language.²⁰ * * *

STORY v. HOLCOMBE.

(Circuit Court of the United States, D. Ohio, 1847. 4 McLean, 306, Fed. Cas. No. 13,497.)

MCLEAN, Circuit Justice. The plaintiffs in this case complain that the defendants, in printing and publishing, "An Introduction to Equity Jurisprudence, on the Basis of Story's Commentaries, etc., by James P. Holcombe," have infringed the copyright in Judge Story's "Commentaries on Equity

²⁰ Extracts and quotations, possibly, may be used to limited extent for purposes of illustration or criticism. See, 9 Cyc. 942, 943.

Jurisprudence," and they pray that the defendants may be enjoined, etc. The defense set up is, that the work complained of is a bona fide abridgment of the Commentaries. The special master, to whom both works were referred, reports, that "the chapters and the subjects are the same in both." He states that the "Equity Jurisprudence" of Judge Story contains one thousand eight hundred and fifty-six octavo pages, including notes; and that the "Introduction to Equity," by Mr. Holcombe, contains three hundred and forty-eight octavo pages, including notes. That "a page in Holcombe contains a little more than one of Story; that, reduced to the same sized page, the ratio in the amount of matter in Holcombe's book to that of Story, is about in the relation of two to nine; that, in the entire work of Story, there are two hundred and twenty-six pages, constituting nearly an eighth part, on which there is some matter which has been extracted in the same language, or very nearly so, into the book of Mr. Holcombe. This matter comprises eight hundred and seventy-nine lines of Mr. Holcombe's book, which is about equivalent to twenty-four pages of Holcombe and thirty of Story, which makes one-fifteenth part of Holcombe and one-sixtieth of Story. This matter is found in scattered paragraphs in the first third of Holcombe's book." And the master states, that "all the other portions of the 'Equity Jurisprudence' of Judge Story have been abridged by Mr. Holcombe without any transcription of the common language or words of Story. The part so abridged by Holcombe comprehends two-thirds of his book." The first hundred pages of Mr. Holcombe's book, which comprises ten chapters, contain about two thousand lines, exclusive of notes, about nine hundred of which are copied from Judge Story's Commentaries. From the succeeding chapters of Story, Mr. Holcombe has copied certain passages; but generally he has abridged the matter so as to reduce it, in his own language, to a small space. Very few, if any of the notes are taken from Story. After a very able and laborious examination of the two works, the special master comes to the conclusion that there is no infringement; but that the work of Holcombe is a fair abridgment of the Commentaries of Judge Story. It was agreed that the cause should be argued and decided on its merits, and not on exceptions to the report of the master.

This controversy has caused me great anxiety and embarrassment. On the subject of copyright, there is a painful uncertainty in the authorities; and indeed there is an inconsistency in some of them. That the complainants are entitled to the copyright which they assert in their bill, is not controverted by the defendants. The decision must turn on the ques-

tion of abridgment. If this were an open question, I should feel little difficulty in determining it. An abridgment should contain an epitome of the work abridged—the principles, in a condensed form of the original book. Now it would be difficult to maintain that such a work did not affect the sale of the book abridged. The argument that the abridgment is suited to a different class of readers, by its cheapness, and will be purchased on that account by persons unable and unwilling to purchase the work at large, is not satisfactory. This to some extent may be true; but are there not many who are able to buy the original work, that will be satisfied with the abridgment? What law library does not contain abridgments and digests, from Viners and Comyns down to the latest publications. The multiplication of law reports and elementary treatises, creates a demand for abridgments and digests; and these being obtained, if they do not generally, they do frequently prevent the purchase of the works at large. The reasoning on which the right to abridge is founded, therefore, seems to me to be false in fact. It does, to some extent in all cases, and not unfrequently to a great extent, impair the rights of the author—a right secured by law.

The same rule of decision should be applied to a copyright as to a patent for a machine. The construction of any other machine which acts upon the same principle, however its structure may be varied, is an infringement on the patent. The second machine may be recommended by its simplicity and cheapness; still, if it act upon the same principle of the one first patented, the patent is violated. Now an abridgment, if fairly made, contains the principle of the original work, and this constitutes its value. Why, then, in reason and justice, should not the same principle be applied in a case of copyright as in that of a patented machine? With the assent of the patentee, a machine acting upon the same principle, but of less expensive structure than the one patented, may be built; and so a book may be abridged by the author, or with his consent, should a cheaper work be wanted by the public. This, in my judgment, is the ground on which the rights of the author should be considered.

But a contrary doctrine has been long established in England, under the statute of Anne, which, in this respect, is similar to our own statute; and in this country the same doctrine has prevailed. I am, therefore, bound by precedent; and I yield to it in this instance, more as a principle of law, than a rule of reason or justice.

The infringement of a copyright does not depend so much upon the length of the extracts as upon their value. If they embody the spirit and the force of the work in a few pages,

they take from it that in which its chief value consists. This may be done to a reasonable extent by a reviewer, whose object is to show the merit or demerit of the work. But this privilege can not be so exercised as to supersede the original book. *Bramwell v. Halcomb*, 3 Mylne & C. 737; *Folsom v. Marsh* [Case No. 4,901]. In the language of Godson (page 352), the extracts must not be made too freely. Sufficient may be taken to form a correct idea of the whole; but no one is allowed, under the pretense of quoting, to publish either the whole or the principal part of another man's composition: and therefore a review must not serve as a substitute for the book reviewed. If so much be extracted, that the article communicates the same knowledge as the original work, it is an actionable violation of literary property. *Wilkins v. Aikin*, 17 Ves. 422; *Roworth v. Wilkes*, 1 Camp. 97. In *Folsom v. Marsh* [supra] it is said: "No one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passage for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy." This doctrine seems to consider the intention with which the citations are made as necessary to an infringement. In *Cary v. Kearsley*, 4 Esp. 170, Lord Ellenborough takes the same view. But I can not perceive how the intention with which extracts are made, can bear upon the question. The inquiry is, what effect must the extracts have upon the original work. If they render it less valuable by superseding its use, in any degree, the right of the author is infringed: and it can be of no importance to know with what intent this was done. Extracts, made for the purpose of a review, or a compilation, are governed by the same rule. In neither case can they be extended so as to convey the same knowledge as the original work.

But the great question in the case is, whether the book of Mr. Holcombe is a fair abridgement of that of Judge Story. The word abridged means "to epitomize," "to reduce," "to contract." In *Strahan v. Newberry* [In re Newberry], Lofft, 775, Chancellor Apsley said, "to constitute a true and proper abridgment of a work, the whole amount must be preserved in its sense, and then the act of abridgment is an act of the understanding, employed in carrying a larger work into a smaller compass." In this view Mr. Justice Blackstone concurred, who seems to have been consulted by the chancellor. Mr. Justice Story says, in *Folsom v. Marsh*: "So it has been decided, that a fair and bona fide abridgment of an original

work, is not a piracy of the copyright of the author; but then, what constitutes a fair and bona fide abridgment, in the sense of the law, is one of the most difficult points, under particular circumstances, which can arise for judicial discussion. It is clear, that a mere selection, or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment. There must be real substantial condensation of the materials, and intellectual labor and judgment bestowed thereon, and not merely the facile use of the scissors, or extracts of the essential parts, constituting the chief value of the original work." In *Gyles v. Wilcox*, 2 Atk. 143, Lord Hardwicke said: "Where books are colorably shortened only, they are undoubtedly within the meaning of the act of parliament, and are a mere evasion of the statute, and can not be called an abridgment."

A fair abridgment of any book is considered a new work, as to write it requires labor and exercise of judgment. It is only new in the sense that the view of the author is given in a condensed form. Such a work must not only contain the arrangement of the book abridged, but the ideas must be taken from its pages. It must be in good faith an abridgment, and not a treatise, interlarded with citations. To copy certain passages from a book, omitting others, is in no just sense an abridgment of it. It makes the work shorter, but it does not abridge it. The judgment is not exercised in condensing the views of the author. His language is copied, not condensed; and the views of the writer, in this mode, can be but partially given. To abridge is to preserve the substance, the essence of the work, in language suited to such a purpose. Gould's Abridgment of Allison's History of Europe gives all the material facts of the original work, covering the whole line of the narrative: and this, in a legal sense, may be called an abridgment.

In the argument it was insisted, that an elementary work is not a proper subject for abridgment. There may be works which are not susceptible of this process. Treatises on the exact sciences may constitute an exception; but works on law, elementary or otherwise, are not within the exception. Hale's Pleas of the Crown, Blackstone's Commentaries, and Kent's, have been abridged, and other works of a similar character. What is the character of the work complained of? Upon its title-page it does not purport to be an abridgment, but "An Introduction to Equity Jurisprudence, on the Basis of Story's Commentaries;" and in the preface the author says: "It is not intended to supply the place of the Commentaries, with any class of readers, but to serve simply as an in-

roduction, a companion and a supplement to their study. The text is substantially an abridgment of that work. The same general plan and arrangement has been pursued, and the elementary principles which are supposed to possess most practical value, selected and presented, with appropriate illustrations, in a greatly condensed form. The author has felt at liberty to make very considerable alterations and additions (entirely, however, of an elementary character), believing that this course would not diminish, but increase the adaptation of his own work, to be a companion to the study of the Commentaries." If this book were intended to be a mere abridgment of the Commentaries, the fact is not indicated in the title.

Within my knowledge no abridgment has been made of any book which has not been so entitled. An introduction may be an exordium, a preface, or the preliminary part of a book; but it is not an abridgment. The author says "the text is substantially an abridgment of the Commentaries;" but he also says, that "he has felt at liberty to make very considerable alterations and additions." Alterations of the original work, and additions to the text, are not appropriate to an abridgment. In saying, therefore, that "the text is substantially an abridgment," Mr. Holcombe could have meant nothing more than that, in writing his book, he followed the arrangement of the Commentaries, extracting certain parts, condensing others, with "very considerable alterations and additions" of his own. A supplement to the Commentaries, which Mr. Holcombe says, in some sense is the character of his work, may supply defects in the original; but it can in no sense be considered an abridgment. This remark seems to have been made in reference to the notes added by the author.

It may not be essential to exclude extracts entirely from an abridgment; but in making extracts merely, there is no condensation of the language of the author, and consequently there is no abridgment of it. Much looseness is found in the decisions upon this subject. Some of the judges would seem to consider, that where a book is greatly reduced in its size, though made up principally of extracts, it is an abridgment. In a book of reports, such as "Bacon's Abridgment," the language of the court is necessarily adopted often to show the principle of the decision. But the same necessity does not exist, and the same license can not be exercised in abridging an elementary work. In the case of the assignees of Dodsley v. Kinnersley, 1 Amb. 402, it was held, that abstracts made from a tale written by Johnson, called the "Prince of Abyssinia," did not infringe the copyright; but that decision was

much influenced by the fact, that the author himself had published similar abstracts in a periodical paper. In *Emerson v. Davies* [Case No. 4,436], Judge Story says: "To amount to an infringement, it is not necessary that there should be a complete copy or imitation in use throughout; but only that there should be an important and valuable portion which operates injuriously to the copyright of the plaintiff."

All the authorities agree that to abridge requires the exercise of the mind, and that it is not copying. To compile is to copy from various authors into one work. In this the judgment may be said to be exercised to some extent in selecting and combining the extracts. Such a work entitles the compiler, under the statute, to a right of property. This right may be compared to that of a patentee, who, by a combination of known mechanical structures, has produced a new result.

Between a compilation and an abridgment, there is a clear distinction; and yet it does not seem to have been drawn in any opinion cited. A compilation consists of selected extracts from different authors: an abridgment is a condensation of the views of the author. The former can not be extended so as to convey the same knowledge as the original work: the latter contains an epitome of the work abridged and consequently conveys substantially the same knowledge. The former can not adopt the arrangement of the works cited; the latter must adopt the arrangement of the work abridged. The former infringes the copyright, if matter transcribed, when published, shall impair the value of the original book: a fair abridgment, though it may injure the original, is lawful. 1 *Brown*, Ch. 451; *Gyles v. Wilcox*, 2 Atk. 141. There is, then, a right which the abridger may exercise, far beyond that of a mere compiler. His labor is of a different kind, and of a higher order. It is therefore important that the works of these two characters should not be so blended as to place them upon the same footing: and yet in many of the decisions, no distinction is made between them. The same facts and reasoning are applied indiscriminately to both cases; and not unfrequently there is a confusion in the argument, which tends more to perplex than to enlighten the reader.

In the case of *Folsom v. Marsh*, above cited, Mr. Justice Story says: "It seems to me, therefore, that is a clear invasion of the right of property of the plaintiffs, if the copying of parts of a work, not constituting a major part, can ever be a violation thereof; as, upon principle and authority, I have no doubt it may be. If it had been the case of a bona fide abridgment of the work of the plaintiffs, it might have admitted of a very different consideration." It is said that in many parts of the Commentaries there are citations from

other works. This is true. And who could write a book entirely new upon jurisprudence? Principles, not familiar to the profession, could be of little value and of no authority. No author, by copying from others, can withdraw from general use, that which has been given to the public. Judge Story did not intend his book to be an abridgment, but a treatise on jurisprudence; and the approbation of this work by the profession, in this country and in England, is high evidence of its merit, and of the great learning and ability of the author.

Whatever doubts may have been formerly entertained, it is now clear, that a book may, in one part of it, infringe the copyright of another book, and in other parts be no infringement; and in such a case, the remedy will not be extended beyond the injury. Lord Hardwicke once laid down a doctrine contrary to this; but that opinion has been overruled by subsequent decisions. Nearly one half of the text, in the first hundred pages of Mr. Holcombe's book, appears to have been extracted from Story. That this was done by him under a conviction that he was exercising a common right, no one acquainted with his legal talent and honorable bearing, can doubt. But these constitute no criterion for the decision of the case. That the view of Mr. Holcombe in this respect, is not without a seeming sanction, in the opinion of some judges, is admitted. To class these extracts under the head of "Abridgment," would seem to be a perversion of terms. Whatever else this part of Mr. Holcombe's book may be called, it is not an abridgment. With greater propriety it may be called a compilation, as the extracts contained in it are taken from various authors. As a compilation, this part of the book must be considered an infringement of the right of the plaintiffs, by the copious extracts made from the Commentaries, and the classification of the subjects copied from them. So far as citations are made in the Commentaries, Mr. Holcombe had a right to go to the original works, and copy from them; but he could not avail himself of the labor of Judge Story, by copying the extracts as compiled by him. This is a well established principle. Nor could he copy the plan or arrangement of the subjects in the Commentaries. It is said there can be no copyright in a plan, distinct from the work itself, any more than there can be a copyright in an idea. This is admitted: but the words in which an idea is expressed, is a subject of property; and so is the classification of the subject discussed.

Looking at the smallness of Mr. Holcombe's book, in comparison of that from which it was principally taken, one might suppose that the former was a short abridgment of the latter. But this comparison of size or number of pages, af-

fords no guide to a proper decision. The character of the work must depend upon its matter: and it would seem from the considerations stated, that the first third part of Mr. Holcombe's book, including one hundred pages, can not be justly and legally called an abridgment, as it does not possess the essential ingredients of such a work; and that, viewing it as a compilation, it is an infringement of the plaintiff's right, on the ground that the plan of the Commentaries is copied; and also for the reason that the extracts extend beyond the proper limit for such a work. The remaining two thirds of the book may be comprehended under a liberal construction of an abridgment. The matter is greatly condensed by Mr. Holcombe in his own language, and in a manner highly creditable to him.

The prayer of the bill as to the first hundred pages, is granted. I have been brought to this result reluctantly, being sensible that the motives of Mr. Holcombe were honorable, and that there was no intention on his part, unjustifiably, to appropriate the labors of Judge Story to his own advantage. In this view, I can not refrain from saying, that an adjustment of the controversy by the parties themselves, would be extremely gratifying to me; and, from my intimate knowledge of the eminent qualities of my lamented brother, and I will add, of his unbounded respect for talent and high character, that I cannot be mistaken in saying, if he were living, an amicable adjustment would be most gratifying to him.²¹

²¹ The wisdom and correctness of this decision, in holding an abridgment lawful, has been questioned. See, Drone, *Treatise on the Law of Property in Intellectual Productions*, p. 440.

CHAPTER VIII

RIGHTS AND DUTIES OF NEWS-GATHERING
AGENCIESINTERNATIONAL NEWS SERVICE v. ASSO-
CIATED PRESS.

(Supreme Court of the United States, 1918. 248 U. S. 215, 39 Sup. Ct. 68, 63 L. Ed. 211, 2 A. L. R. 293.)

Mr. Justice PITNEY delivered the opinion of the Court.

The parties are competitors in the gathering and distribution of news and its publication for profit in newspapers throughout the United States. The Associated Press, which was complainant in the District Court, is a co-operative organization, incorporated under the Membership Corporations Law of the state of New York, its members being individuals who are either proprietors or representatives of about 950 daily newspapers published in all parts of the United States. That a corporation may be organized under that act for the purpose of gathering news for the use and benefit of its members and for publication in newspapers owned or represented by them, is recognized by an amendment enacted in 1901 (Laws N. Y. 1901, c. 436). Complainant gathers in all parts of the world, by means of various instrumentalities of its own, by exchange with its members, and by other appropriate means, news and intelligence of current and recent events of interest to newspaper readers and distributes it daily to its members for publication in their newspapers. The cost of the service, amounting approximately to \$3,500,000 per annum, is assessed upon the members and becomes a part of their costs of operation, to be recouped, presumably with profit, through the publication of their several newspapers. Under complainant's by-laws each member agrees upon assuming membership that news received through complainant's service is received exclusively for publication in a particular newspaper, language, and place specified in the certificate of membership, that no other use of it shall be permitted, and that no member shall furnish or permit any one in his employ or connected with his newspaper to furnish any of complainant's news in advance of publication to any person not a member. And each member is required to gather the local news of his district and supply it to the Associated Press and to no one else.

Defendant is a corporation organized under the laws of the

state of New Jersey, whose business is the gathering and selling of news to its customers and clients, consisting of newspapers published throughout the United States, under contracts by which they pay certain amounts at stated times for defendant's service. It has widespread news-gathering agencies; the cost of its operations amounts, it is said, to more than \$2,000,000 per annum; and it serves about 400 newspapers located in the various cities of the United States and abroad, a few of which are represented, also, in the membership of the Associated Press.

The parties are in the keenest competition between themselves in the distribution of news throughout the United States; and so, as a rule, are the newspapers that they serve, in their several districts.

Complainant in its bill, defendant in its answer, have set forth in almost identical terms the rather obvious circumstances and conditions under which their business is conducted. The value of the service, and of the news furnished, depends upon the promptness of transmission, as well as upon the accuracy and impartiality of the news; it being essential that the news be transmitted to members or subscribers as early or earlier than similar information can be furnished to competing newspapers by other news services, and that the news furnished by each agency shall not be furnished to newspapers which do not contribute to the expense of gathering it. And further, to quote from the answer:

"Prompt knowledge and publication of world-wide news is essential to the conduct of a modern newspaper, and by reason of the enormous expense incident to the gathering and distribution of such news, the only practical way in which a proprietor of a newspaper can obtain the same is, either through co-operation with a considerable number of other newspaper proprietors in the work of collecting and distributing such news, and the equitable division with them of the expenses thereof, or by the purchase of such news from some existing agency engaged in that business."

The bill was filed to restrain the pirating of complainant's news by defendant in three ways: First, by bribing employes of newspapers published by complainant's members to furnish Associated Press news to defendant before publication, for transmission by telegraph and telephone to defendant's clients for publication by them; second, by inducing Associated Press members to violate its by-laws and permit defendant to obtain news before publication; and, third, by copying news from bulletin boards and from early editions of complainant's newspapers and selling this, either bodily or after rewriting it, to defendant's customers.

The District Court, upon consideration of the bill and answer, with voluminous affidavits on both sides, granted a preliminary injunction under the first and second heads, but refused at that stage to restrain the systematic practice admittedly pursued by defendant, of taking news bodily from the bulletin boards and early editions of complainant's newspapers and selling it as its own. The court expressed itself as satisfied that this practice amounted to unfair trade, but as the legal question was one of first impression it considered that the allowance of an injunction should await the outcome of an appeal. 240 Fed. 983, 996. Both parties having appealed, the Circuit Court of Appeals sustained the injunction order so far as it went, and upon complainant's appeal modified it and remanded the cause, with directions to issue an injunction also against any bodily taking of the words or substance of complainant's news until its commercial value as news had passed away. 245 Fed. 244, 253, 157 C. C. A. 436. The present writ of certiorari was then allowed. 245 U. S. 644, 38 Sup. Ct. 10, 62 L. Ed. 528.

The only matter that has been argued before us is whether defendant may lawfully be restrained from appropriating news taken from bulletins issued by complainant or any of its members, or from newspapers published by them, for the purpose of selling it to defendant's clients. Complainant asserts that defendant's admitted course of conduct in this regard both violates complainant's property right in the news and constitutes unfair competition in business. And notwithstanding the case has proceeded only to the stage of a preliminary injunction, we have deemed it proper to consider the underlying questions, since they go to the very merits of the action and are presented upon facts that are not in dispute. As presented in argument, these questions are: (1) Whether there is any property in news; (2) whether, if there be property in news collected for the purpose of being published, it survives the instant of its publication in the first newspaper to which it is communicated by the news-gatherer; and (3) whether defendant's admitted course of conduct in appropriating for commercial use matter taken from bulletins or early editions of Associated Press publications constitutes unfair competition in trade.

The federal jurisdiction was invoked because of diversity of citizenship, not upon the ground that the suit arose under the copyright or other laws of the United States. Complainant's news matter is not copyrighted. It is said that it could not, in practice, be copyrighted, because of the large number of dispatches that are sent daily; and, according to complainant's contention, news is not within the operation of the copyright

act. Defendant, while apparently conceding this, nevertheless invokes the analogies of the law of literary property and copyright, insisting as its principal contention that, assuming complainant has a right of property in its news, it can be maintained (unless the copyright act be complied with) only by being kept secret and confidential, and that upon the publication with complainant's consent of uncopyrighted news of any of complainant's members in a newspaper or upon a bulletin board, the right of property is lost, and the subsequent use of the news by the public or by defendant for any purpose whatever becomes lawful. * * *

In considering the general question of property in news matter, it is necessary to recognize its dual character, distinguishing between the substance of the information and the particular form or collocation of words in which the writer has communicated it.

No doubt news articles often possess a literary quality, and are the subject of literary property at the common law; nor do we question that such an article, as a literary production, is the subject of copyright by the terms of the act as it now stands. In an early case at the circuit Mr. Justice Thompson held in effect that a newspaper was not within the protection of the copyright acts of 1790 (1 Stat. 124) and 1802 (2 Stat. 171). *Clayton v. Stone*, 2 Paine, 382, Fed. Cas. No. 2,872. But the present act is broader; it provides that the works for which copyright may be secured shall include "all the writings of an author," and specifically mentions "periodicals, including newspapers." Act of March 4, 1909, c. 320, §§ 4 and 5, 35 Stat. 1075, 1076 (Comp. St. 1916, §§ 9520, 9521). Evidently this admits to copyright a contribution to a newspaper, notwithstanding it also may convey news; and such is the practice of the copyright office, as the newspapers of the day bear witness. See Copyright Office Bulletin No. 15 (1917) pp. 7, 14, 16, 17.

But the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day. It is not to be supposed that the framers of the Constitution, when they empowered Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (Const. art. 1, § 8, par. 8), intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.

We need spend no time, however, upon the general question of property in news matter at common law, or the application of the copyright act, since it seems to us the case must turn upon the question of unfair competition in business. And, in our opinion, this does not depend upon any general right of property analogous to the common-law right of the proprietor of an unpublished work to prevent its publication without his consent; nor is it foreclosed by showing that the benefits of the copyright act have been waived. We are dealing here not with restrictions upon publication but with the very facilities and processes of publication. The peculiar value of news is in the spreading of it while it is fresh; and it is evident that a valuable property interest in the news, as news, cannot be maintained by keeping it secret. Besides, except for matters improperly disclosed, or published in breach of trust or confidence, or in violation of law, none of which is involved in this branch of the case, the news of current events may be regarded as common property. What we are concerned with is the business of making it known to the world, in which both parties to the present suit are engaged. That business consists in maintaining a prompt, sure, steady, and reliable service designed to place the daily events of the world at the breakfast table of the millions at a price that, while of trifling moment to each reader, is sufficient in the aggregate to afford compensation for the cost of gathering and distributing it, with the added profit so necessary as an incentive to effective action in the commercial world. The service thus performed for newspaper readers is not only innocent but extremely useful in itself, and indubitably constitutes a legitimate business. The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 254, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461. * * *

In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right (*In re Sawyer*, 124 U. S. 200, 210, 8 Sup. Ct. 482, 31 L. Ed. 402; *In re Debs*, 158 U. S. 564, 593, 15 Sup. Ct. 900, 39 L. Ed. 1092); and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired (*Truax v. Raich*,

239 U. S. 33, 37-38, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; *Brennan v. United Hatters*, 73 N. J. Law, 729, 742, 65 Atl. 165, 9 L. R. A. [N. S.] 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881). It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition.

[The court here refers to *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 250, and *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294.]

The peculiar features of the case arise from the fact that, while novelty and freshness form so important an element in the success of the business, the very processes of distribution and publication necessarily occupy a good deal of time. Complainant's service, as well as defendant's, is a daily service to daily newspapers; most of the foreign news reaches this country at the Atlantic seaboard, principally at the city of New York, and because of this, and of time differentials due to the earth's rotation, the distribution of news matter throughout the country is principally from east to west; and, since in speed the telegraph and telephone easily outstrip the rotation of the earth, it is a simple matter for defendant to take complainant's news from bulletins or early editions of complainant's members in the eastern cities and at the mere cost of telegraphic transmission, cause it to be published in western papers issued at least as early as those served by complainant. Besides this, and irrespective of time differentials, irregularities in telegraphic transmission on different lines, and the normal consumption of time in printing and distributing the newspaper, result in permitting pirated news to be placed in the hands of defendant's readers sometimes simultaneously with the service of competing Associated Press papers, occasionally even earlier.

Defendant insists that when, with the sanction and approval of complainant, and as the result of the use of its news for the very purpose for which it is distributed, a portion of complainant's members communicate it to the general public by posting it upon bulletin boards so that all may read, or by issuing it to newspapers and distributing it indiscriminately, complainant no longer has the right to control the use to be made of it; that when it thus reaches the light of day it becomes the common possession of all to whom it is accessible; and that any purchaser of a newspaper has the right to communicate the intelligence which it contains to anybody and for any purpose, even for the purpose of selling it for profit to newspapers published for profit in competition with complainant's members.

The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant—which is what defendant has done and seeks to justify—is a very different matter. In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself and a court of equity ought not to hesitate long in characterizing it as unfair competition in business. * * *

The decree of the Circuit Court of Appeals will be affirmed.

Mr. Justice CLARKE took no part in the consideration or decision of this case.

Mr. Justice HOLMES, dissenting. * * * Fresh news is got only by enterprise and expense. To produce such news as it is produced by the defendant represents by implication that it has been acquired by the defendant's enterprise and at its expense. When it comes from one of the great news collecting agencies like the Associated Press, the source generally is indicated, plainly importing that credit; and that such a representation is implied may be inferred with some confidence from the unwillingness of the defendant to give the credit and tell the truth. If the plaintiff produces the news at the same time that the defendant does, the defendant's presentation impliedly denies to the plaintiff the credit of collecting the facts and assumes that credit to the defendant. If the plaintiff is later in Western cities it naturally will be supposed to have obtained its information from the defendant. The falsehood is

a little more subtle, the injury a little more indirect, than in ordinary cases of unfair trade, but I think that the principle that condemns the one condemns the other. It is a question of how strong an infusion of fraud is necessary to turn a flavor into a poison. The dose seems to me strong enough here to need a remedy from the law. But as, in my view, the only ground of complaint that can be recognized without legislation is the implied misstatement, it can be corrected by stating the truth; and a suitable acknowledgment of the source is all that the plaintiff can require. I think that within the limits recognized by the decision of the Court the defendant should be enjoined from publishing news obtained from the Associated Press for ——— hours after publication by the plaintiff unless it gives express credit to the Associated Press; the number of hours and the form of acknowledgment to be settled by the District Court.

Mr. Justice McKENNA concurs in this opinion.¹

STATUTE—KANSAS.

Gen. St. 1915, § 6721: Every person, firm, corporation or association engaged in the business of gathering, collecting, selling and transmitting news and news reports for newspaper use shall furnish and sell such news and news reports to every person, firm or corporation publishing a newspaper in the state of Kansas, upon demand and proffer of payment, upon the same terms as to every other newspaper for the same service, without discrimination.²

¹ Part of the opinion of Mr. Justice Pitney and part of the dissenting opinion of Mr. Justice Holmes and a separate dissenting opinion by Mr. Justice Brandeis are omitted. Excellent notes approving the decision will be found in 17 Mich Law Rev. 490, and 28 Yale Law Jour. 387. The decision is a real triumph for commercial honesty and fair dealing. The question here considered is the only one of large importance that has arisen with reference to news-gathering agencies.

² Sections 6722-6725 of the Kansas act provide further that it shall be unlawful to refuse to render such service and as a penalty for a violation of the act, denial of the right to use telegraph and telephone lines within the state is prescribed. Any telegraph or telephone company that renders service under such conditions is subject to injunction and forfeiture of charter.

Kentucky has a similar statute. See Carroll's St. Ky. 1915, § 883a.

Mandamus to compel a news publishing company to furnish news service to a publisher has been denied, because the performance of such service extends over a long period of time and calls for the exercise of judgment and continuous supervision. 26 Cyc. 381. State v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am.

St. Rep. 368. *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822, 46 L. R. A. 568, 75 Am. St. Rep. 184. This was a suit to enjoin the defendant from expelling plaintiff from membership and for an order requiring defendant to supply plaintiff with news service. In violation of the rules of the company, the plaintiff had secured news from some other agencies. It was held (1) that the restriction against getting news service elsewhere was illegal and void, in that it was an attempt to create a monopoly; and (2) that the defendant's business was charged with a public interest, and that "all newspaper publishers desiring to purchase such news for publication are entitled to purchase the same without discrimination against them." Judgment was accordingly given for the plaintiff. But compare *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741, in which it was held that a by-law of a news association, prohibiting its members from receiving or publishing the dispatches of any other news associations, covering the same territory and organized for the same purpose, is not unreasonable, nor void as in restraint of trade.

A note in 74 Am. St. Rep. at page 262, says that "the tendency of the decisions is certainly in favor of the Illinois rule" on the restraint of trade point.

CHAPTER IX

CONTRACTS

1. **In General.**—Nothing short of a complete treatise on the law of contracts would serve to guide the publisher through all of his business transactions. Such a treatment of the subject cannot be attempted.

The topics chosen are those which have been the subject of clear treatment in the cases and which may prove of special interest to the publisher.

2. **Sending Paper Without Actual Subscription.**—The relation between the publisher and the subscriber is that of contract. As in other cases, the contract may be express or implied. An actual bargain, whether written or oral, on the one hand to take, and on the other hand to send, a paper for a certain period for a certain amount, is an express contract.

When this period expires, if the publisher continues to send the paper, without a further order, one enters the field of implied contracts. If any obligation to pay arises, it is because the promise to pay is implied from the circumstances of the particular case.

The general rule is that, if one continues to accept a paper from the post office for a period of time, he cannot thereafter escape liability to pay for it. His way of escape is to decline to receive it from the postal authorities. Liability may, upon similar principles, be imposed if a paper is sent to one who has not previously been a subscriber.¹

¹ *Austin v. Burge*, 156 Mo. App. 286, 137 S. W. 618, *infra*, p. 442. See, also, *Fogg v. Portsmouth Atheneum*, 44 N. H. 115, 82 Am. Dec. 191; *Goodland v. Le Clair*, 78 Wis. 176, 47 N. W. 268.

"Postmasters shall notify the publisher of any newspaper, or other periodical, when any subscriber shall refuse to take the same from the office, or neglect to call for it for the period of one month." Rev. St. U. S., § 3885, 8 Fed. Stat. Ann. p. 94 (U. S. Comp. St. § 7338).

So far as second-class mail privileges are concerned, a publisher may, if acting in good faith, continue to send his publication for a period of one year after the expiration of a regular subscription period. The postal authorities do not, however, assume, by their

It is necessary, however, for the publisher to prove that the defendant actually received the paper. Proof of mailing to the proper address makes out a *prima facie* case, the natural inference being that it is received.²

3. Sunday Contracts.—There are numerous statutes in the United States which make it unlawful to do any acts on Sunday, other than acts of necessity and charity.

As a result of this legislation it is held that contracts either made or to be performed on Sunday, other than those justified by necessity or charity, are void. In view of the extent to which the newspaper publishing business is conducted on Sundays, these laws become of moment to publishers. What, for example, are the legal rights and duties between the publisher and his advertisers, his employees, and those through whom sales are made, where the Sunday edition of the paper is involved?

In New York it was held in an early case that a contract for the publication of an advertisement in a newspaper to be issued and sold on Sunday was void, and the paper could not recover for running such advertisements.³

In Minnesota it has likewise been held that a contract between a newspaper and a general advertising agent was unenforceable, because it involved in part Sunday services.⁴

Pennsylvania has assumed a similar attitude toward the Sunday newspaper.⁵

To the contrary, however, a recent case in Missouri has

regulations or otherwise, to deal with the question of the right of the publisher to collect from the subscriber. See Postal Rules and Regulations § 41, par. 4.

² *Shoemaker v. Roberts*, 103 Iowa, 681, 72 N. W. 776: "That one who receives a newspaper without objection, and has the benefit thereof, is liable upon an implied contract to pay for the same, is conceded. But, to establish such liability, it must be shown affirmatively that the defendant received the paper, or such a state of facts must be recited as that the presumption arises that it was received by the person to whom it was addressed." *Legal News Pub. Co. v. George C. Knispel Cigar Co.*, 142 Minn. 413, 172 N. W. 317.

³ *Smith v. Wilcox*, 24 N. Y. 353, 82 Am. Dec. 302, *infra*, p. 448.

⁴ *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188, 42 N. W. 872, 4 L. A. 466, 16 Am. St. Rep. 695.

⁵ *Commonwealth v. Matthews*, 152 Pa. 166, 25 Atl. 548, 18 L. R. A. 761, *infra*, p. 446.

taken the position that the publication of a Sunday newspaper comes under the "necessity" exception to the Sunday laws, and hence that contracts for advertising to be carried in the Sunday edition of a newspaper are valid. After pointing out that the operation of trains and telephones have been held to be works of necessity, the court observes:

"The press is a greater public necessity than all of them. In my opinion it ranks as one of the four great institutions of the country, namely, the home, the church, the public school, and the press."⁶

4. Liability of Publishers for Mistake in the Performance of Printing Contracts.—A material breach of contract will not only preclude the party in default from recovering for the service that he was to perform, but will in turn subject him to damages proximately resulting to the other party from the breach.

As a general rule, a party who has broken his contract is liable for those damages which, within the reasonable expectation of the parties, would be likely to result from the breach. The converse of this rule is that one is not liable for remote damages, or those which are merely speculative and conjectural.

These are general rules of the law of damages as applied to contracts, and are not limited in their application to contracts in the printing and publishing business.

Concrete cases only shed light on the general rules. They can seldom serve as absolute guides to decisions in other cases, for the reason that circumstances differ throughout a considerable range, and will thus lead to different specific results. Too slavish a use of the cases as guides to other cases, which may in a more or less general way be similar, is to be scrupulously avoided. Moreover, some of the decisions might not be followed in other jurisdictions under exact circumstances.

The following cases are offered, therefore, only to amplify and as casual illustrations of the operation of the gen-

⁶ *Pulitzer Pub. v. McNichols* (Mo. Sup.) 181 S. W. 1 (1915), *infra*, p. 444.

eral rule. The actual judgments should not induce printers to relax their vigilance in the avoidance of error. There is ample room, within the principle of the general rule, for the imposition of very substantial damages.

In *Glass v. Garber*⁷ the complaint against the defendant as publisher of a weekly newspaper, alleged that the plaintiff, a retailer of intoxicating liquors, in order to obtain a renewal of a license, then about to expire, paid the defendant the sum of three dollars and fifty cents, for which the latter agreed to publish in his paper, for at least twenty days prior to a certain date, a notice of the plaintiff's intention to apply to the board of commissioners for a renewal of his license, but that on account of the defendant's failure to publish the notice the plaintiff failed to obtain his license and was obliged to close his saloon for the period of one month. It was held that the plaintiff was entitled to recover at least the amount which he had paid to the defendant for the advertising, and in addition that, "if, in consequence of the facts averred, the complainant's house and fixtures therein and place of business became useless to him for a time, that it is a fair element for a jury to consider, in estimating the damages the appellant [plaintiff] may have suffered. * * *" The court, however, did not agree with the plaintiff to the effect that expected profits of fifteen dollars per day would be the measure, since they are problematical, vague, and uncertain.⁸

The Pennsylvania court, in an action against a publisher for neglecting to insert an advertisement of a public sale [not official] of real estate, for which payment was made in advance, held that the measure of damages, in the absence of fraud, was the amount paid for the publication and that the difference between what the land was sold for, viz. \$1,800, and the amount that it was worth, viz. \$3,000, could not be allowed, because it was too speculative.⁹

⁷ 55 Ind. 336.

⁸ This limitation upon the use of prospective profits as an admeasurement of damages seems doubtful. They are not necessarily so problematical as to rule them out. Previous profits may constitute a safe basis of estimate.

⁹ *Eisenlohr v. Swain*, 35 Pa. 107, 78 Am. Dec. 328. This decision

A Massachusetts case reveals forcibly the harmful results of carelessness in legal advertising. A notice of sale under execution was given to the defendant to publish, giving Monday, June 20th, as the day of the sale. The notice was to appear first on May 26th. Instead it did not appear until May 30th, and gave Monday, June 28th, instead of June 20th, as the day of the sale. The property was offered for sale June 20th, but the purchaser refused to take the deed when the mistake was discovered. As a result of this error the plaintiff lost his hold on the property and was \$1,049.29 out of pocket. In sending the case back to the trial court, the Supreme Court said: "The undertaking of the defendants, in this case, being for hire, and in the exercise of their ordinary occupation—that of printing—they must be answerable for any neglect or mismanagement in the performance of their trust, and for any loss or damage which might have been avoided by that degree of care and diligence which their employer had a right to expect and rely upon. If, therefore, the printers were not misled by the writing of the advertisement delivered them—as, for instance, supposing it now examinable, if 'twentieth' was not so written as to be mistaken for 'twenty-eighth,' supposing a suitable degree of attention on the part of the compositor—I think the defendants are liable in this action." The court points out further that, if special liability is to be imposed on the printer, it must appear that he was advised of special risks and damages that would arise from error.¹⁰

seems correct on the latter point. There would be no possible way of determining whether the land would have sold for this larger amount, if the advertisement had been inserted.

¹⁰ Jackson v. Adams, 9 Mass. 484, 6 Am. Dec. 94 (1813).

SECTION 1.—SENDING PAPER WITHOUT EXPRESS ORDER

AUSTIN v. BURGE.

(Kansas City Court of Appeals, Missouri, 1911. 156 Mo. App. 286, 137 S. W. 618.)

ELLISON, J. This action was brought on an account for the subscription price of a newspaper. The judgment in the trial court was for the defendant. It appears that plaintiff was publisher of a newspaper in Butler, Mo., and that defendant's father-in-law subscribed for the paper, to be sent to defendant for two years, and that the father-in-law paid for it for that time. It was then continued to be sent to defendant, through the mail, for several years more. On two occasions defendant paid a bill presented for the subscription price, but each time directed it to be stopped. Plaintiff denies the order to stop, but for the purpose of the case we shall assume that defendant is correct. He testified that, notwithstanding the order to stop it, it was continued to be sent to him, and he continued to receive and read it, until finally he removed to another state.

We have not been cited to a case in this state involving the liability of a person who, though not having subscribed for a newspaper, continues to accept it by receiving it through the mail. There are, however, certain well-understood principles in the law of contracts that ought to solve the question. It is certain that one cannot be forced into contractual relations with another and that therefore he cannot, against his will, be made the debtor of a newspaper publisher. But it is equally certain that he may cause contractual relations to arise by necessary implication from his conduct. The law in respect to contractual indebtedness for a newspaper is not different from that relating to other things which have not been made the subject of an express agreement. Thus one may not have ordered supplies for his table, or other household necessities, yet if he continue to receive and use them, under circumstances where he had no right to suppose they were a gratuity, he will be held to have agreed, by implication, to pay their value. In this case defendant admits that, notwithstanding he ordered the paper discontinued at the time when he paid a bill for it, yet plaintiff continued to send it, and he continued to take it from the post office to his home. This was an acceptance and use of the property, and, there

being no pretense that a gratuity was intended, an obligation arose to pay for it.

A case quite applicable to the facts here involved arose in *Fogg v. Atheneum*, 44 N. H. 115, 82 Am. Dec. 191. There the Independent Democrat newspaper was forwarded weekly by mail to the defendant from May 1, 1847, to May 1, 1849, when a bill was presented, which defendant objected to paying on the ground of not having subscribed. Payment was, however, finally made, and directions given to discontinue. The paper changed ownership, and the order to stop it was not known to the new proprietors for a year; but, after being notified of the order, they nevertheless continued to send it to defendant until 1860, a period of 11 years, and defendant continued to receive it through the post office. Payment was several times demanded during this time, but refused on the ground that there was no subscription. The court said that: "During this period of time the defendants were occasionally requested, by the plaintiff's agent, to pay their bill. The answer was, by the defendants, 'We are not subscribers to your newspaper.' But the evidence is the defendants used or kept the plaintiff's * * * newspapers, and never offered to return a number, as they reasonably might have done, if they would have avoided the liability to pay for them. Nor did they ever decline to take the newspapers from the post office." The defendant was held to have accepted the papers, and to have become liable for the subscription price by implication of law.

In *Ward v. Powell*, 3 Har. (Del.) 379, it was decided that an implied agreement to pay for a newspaper or periodical arose by the continued taking and accepting the paper from the post office, and that "if a party, without subscribing to a paper, declines taking it out of the post office, he cannot become liable to pay for it; and a subscriber may cease to be such at the end of the year, by refusing to take the papers from the post office, and returning them to the editor as notice of such determination." In *Goodland v. Le Clair*, 78 Wis. 176, 47 N. W. 268, it was held that if a person receives a paper from the post office for a year, without refusing or returning it, he was liable for the year's subscription. And a like obligation was held to arise in the case of *Weatherby v. Bonham*, 5 C. & P. 228.

The preparation and publication of a newspaper involves much mental and physical labor, as well as an outlay of money. One who accepts the paper, by continuously taking it from the post office, receives a benefit and pleasure arising from such labor and expenditure as fully as if he had appropriated any other product of another's labor, and by such

act he must be held liable for the subscription price. On the defendant's own evidence, plaintiff should have recovered.

The judgment will therefore be reversed, and the cause remanded. All concur.¹¹

SECTION 2.—SUNDAY CONTRACTS

PULITZER PUB. CO. v. McNICHOLS.

(Supreme Court of Missouri, Division No. 1, 1915. 181 S. W. 1.)

This is an action for the balance due under a contract for printing certain advertisements of merchandise in the St. Louis Post-Dispatch. The only question is as to the liability of the defendant for printing done on Sunday.

WOODSON, C. J.¹² While we have read both opinions of the Court of Appeals with much interest and great profit, yet we base our decision of this case upon the broad ground that the work and labor complained of by the defendant does no violence to said section 4801, which reads as follows: "Every person who shall either labor himself, or compel or permit his apprentice or servant, or any other person under his charge or control, to labor or perform any work other than the household offices of daily necessity, or other works of necessity or charity, or who shall be guilty of hunting game or shooting on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars."

By reading this statute it will be seen that household work of necessity and other works of necessity or charity are expressly excepted from its operation. That being true, then the only question presented for determination is whether or not the publication of the great daily papers of the country on Sunday is a work of necessity. In order to decide that question correctly we should take a brief view of the service the great daily papers of the cities, which constitute a large part of what we call the press of the country, is doing for the good of humanity. The press disseminates practically all of the public news of the world and a large part of that which is personal; it imparts intelligence regarding the public health,

¹¹ By statute in Florida, no person is legally liable to pay for a paper unless he subscribes for or orders the same in writing. See Comp. Laws Fla. 1914, § 2519. Sending a publication without an order shall be deemed a gift. L. O. L. § 7585 (Oregon).

¹² The statement of facts is abridged.

public morals, and public safety, and materially aids in the preservation of the two former and in the defense of the latter; it is the mouthpiece of the statesman and lawmaker, and proclaims to the world how governmental affairs are administered; it points to the capable and honest official usually with just commendation, and singles out the inefficient and those derelict in duty; and as a rule is at the head of those collecting and disbursing public charity.

Moreover the press is a great educator in literature, art, and science, and points out their beneficent influence upon the home, morality, and religion; it enables the poor who earn their bread by the sweat of their faces to procure employment, to familiarize themselves with the best and cheapest necessities of life and the most reliable places where they may be procured; it imparts to the business man price currents which largely control the commerce of the world; it informs the financier the rates of items and exchange around the world, which keep finances of all nations within conservative bounds; and it makes known to employers of labor the condition of the industrial world, etc., and so on to the end of all good and useful vocations of life. The great service the press is rendering to humanity is performed on Sunday as well as upon Monday or upon any other day of the week, and its beneficence is more potent on the former than on the latter, for the simple reason that the toiling masses have more time to read the papers on Sunday than upon any other day of the week, and therefore acquire greater knowledge and information from them regarding the matters stated on that day than upon any other day.

Upon this state of affairs, where is the court or jury in Christendom which would convict the publishers of the Post-Dispatch if indicted for publishing that paper on Sunday? This is the test. Of course they do not exist, and that is because the former would take judicial notice of the fact that such publications are matters of public necessity, and the latter would not stultify itself by finding a verdict of guilty against the publishers in the face of overwhelming evidence which would be introduced in such a case. The fact that the paper contained the advertisement, and that a part of the labor which was used in making it up and printing and delivering it was increased on that account, in no manner altered the case, for the reason that the paper with its advertisements constituted the necessity, and such a paper without them would be practically worthless to thousands in every city.

In the progress of time and the uplift of man, things which used to be useless or luxurious have become prime necessities. For instance, the railroads, the street cars, the tele-

graph, and the telephone. All of these have been declared public necessities, and this court, in the case of *State v. Railroad*, 239 Mo. 196, 143 S. W. 785, held that railroads could be compelled, under a legislative enactment, to operate trains on Sunday, and in a number of cases that telephones are public necessities. The press is a greater public necessity than all of them. In my opinion it ranks as one of the four great institutions of the country, namely, the home, the church, the public school, and the press. We have so recently been over the question, work of necessity, and collected and cited the authorities through the country bearing upon it, in the case of *State v. Railroad*, *supra*, no good or useful purpose would be served by a further discussion of it here.

We are therefore of the opinion that the St. Louis Court of Appeals decided the case correctly, and that the case of *Knapp & Co. v. Culbertson*, 152 Mo. App. 147, 133 S. W. 55, should be overruled, and that the judgment of the circuit court of the city of St. Louis should be reversed, with directions to enter judgment for the plaintiff for the amount sued for, with interest and costs; and it is so ordered.¹³

COMMONWEALTH v. MATTHEWS.

(Supreme Court of Pennsylvania, 1893. 152 Pa. 166, 25 Atl. 548, 18 L. R. A. 761.)

PER CURIAM. This was an appeal in the court below from the judgment of Alderman Rohe, of Pittsburgh, convicting the defendant (appellant) of doing and performing worldly employment on December 27, 1891, commonly called "Sunday," contrary to the act of assembly of April 22, 1794, and the supplemental acts of February 25, 1855. The charge, as shown by the record, was "selling a paper known as the 'Pittsburgh Sunday Leader,' exposing the same for sale, and keeping his place open for business at No. 13 Frankstown avenue, Pittsburgh." It was established by the evidence in the case, to the satisfaction of the learned judge below, that the defendant kept open his place of business on Sunday, December 27, 1891, and that Sunday papers of that date were upon that day sold therein, and that he received and caused to be delivered to his customers upon his route as a carrier, upon that day, the newspapers which had that day been published. There is no dispute about the facts. The defendant kept open his place of business on the day referred to, and sold and delivered Sunday papers on that day, in the regular

¹³ Compare *Com. v. Matthews and Smith v. Wilcox*, *infra*.

course of business. This brings the case directly within the act of 1794, and the supplemental act of 1855, which increases the penalty. Unless, therefore, the case comes within the exceptions of the act of 1794, the judgment must stand.

The act of 1794, while prohibiting the performance of any worldly employment or business on the Lord's day, commonly called "Sunday," excepts "works of necessity and charity" from the penalty of the act. The proviso, however, recognizes, to some extent, the wants and convenience of the people, where it provides "that nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bake houses, lodging houses, inns, and other houses of entertainment, for the use of sojourners, travelers, or strangers, or to hinder watermen from landing their passengers, or ferrymen from carrying over the water travelers, or persons removing with their families on the Lord's day, commonly called Sunday, nor to the delivery of milk or the necessaries of life, before nine o'clock in the forenoon nor after five o'clock in the afternoon of the same day." It is now almost 100 years since the passage of the act of 1794. It is hardly likely the framers of the act contemplated the possibility of Sunday newspapers. There were but few newspapers in existence at that time, and, with perhaps one or two exceptions, those were weekly papers, of limited circulation. Since then, there has been a vast development in the business of newspaper publishing, as well as in other departments of trade and business. The development of the resources of the commonwealth has been phenomenal, as well as its growth in population. This growth has developed new wants, and to some extent changed the habits of the people. Among the changes which it has caused is the Sunday newspaper. Its circulation has become very extensive, and it is read by a large portion of our citizens. It has become a part of the ordinary life of the people, and it will require far more stringent legislation than the act of 1794 to uproot it.

It is not our province to approve or condemn Sunday newspapers, but it is worse than useless to ignore their existence, or the favor with which they have been regarded by a large portion of the community. The framers of the act of 1794, could they have seen the development of the next hundred years, and the change in the habits and wants of the people, might or might not have included the traffic in Sunday newspapers among the exceptions in the act. It is sufficient for us that they have not done so. The defendant must not expect us to administer the law to suit his case, or as he thinks it ought to be administered. There are many persons who have no higher opinion of judicial duties than to think that

the law should be administered according to their caprice, or their notion of what the law ought to be. It is our plain duty to enforce the act of 1794 as we find it upon the statute book. While the Sunday newspaper may be a great convenience to a large portion, perhaps a large majority, of the people, it does not, in our opinion, come within the exceptions of the act of 1794. No one pretends that it is a charity, and we cannot say, as a matter of law, that it is a necessity. It is a convenience; nothing more. We are of opinion the defendant was properly convicted. The act of 1794 is a wise and beneficial statute, and we would regret to see it interfered with. We must, however, be allowed to express the fear that too literal an interpretation and enforcement of it may create an antagonism that may lead to its repeal, or at least serious modification. There may be such a thing as excessive zeal in invoking its penalties in extreme cases. The act is in more danger from its friends than from its enemies.

Judgment affirmed.

SMITH v. WILCOX.

(Court of Appeals of New York, 1862. 24 N. Y. 353, 82 Am. Dec. 302.)

Action by plaintiffs, proprietors of a newspaper, the Sunday Courier, to recover the agreed price for publishing an advertisement for the defendants in such newspaper for six months, according to contract. The contract and performance by the plaintiffs were proved. It was further proved that the Sunday Courier was a weekly paper, dated and issued on Sunday; that the proprietors commenced selling the papers early Sunday morning; and that they had a public place for selling the papers opened for any one to buy. The plaintiffs were nonsuited on the trial before Rosevelt, J., upon the ground that the contract for the publication of the advertisement, and its publication, contravened the law for the observance of the Sabbath. The judgment was affirmed by the Supreme Court, and the plaintiffs appealed.

ALLEN, J.¹⁴ * * * The service to be rendered by the plaintiffs was the publication of an advertisement in a Sunday newspaper. There is no pretense that it was a work of necessity and charity, either to publish the paper or the advertisement, even if it could be brought within the section of which the exception in favor of works of "necessity and charity" forms a part. The advertisement was published with, and as incidental to, the publication of the paper, and the contract must

¹⁴ The statement of facts is rewritten and part of the opinion is omitted.

be assumed to have contemplated the service to be performed in the usual way, and as it was in truth done. The papers were sold on Sunday at a public place provided by the plaintiffs, the proprietors, for that purpose; that was the publication, and that the service agreed to be performed, and for which they now ask compensation. The publication of the advertisement was to be, and was, by a public sale of the newspaper in which it was printed, on Sunday. The opening of a place for the sale and the actual selling of newspapers is within the mischiefs which the act for the observance of Sunday was designed to remedy. It disturbs the public peace and quiet; interferes with the proper religious observance of the day; is opposed to good morals; and tends to draw men away from the duties of piety and religion, and cannot be distinguished from traffic in any other article which is the subject of sale in market. It matters not what the character of the paper or the character of the advertisement published for the defendants may have been. Neither were "meats, milk, or fish," and therefore were not within the articles excepted from the prohibition, and even if it were within the other section of the statute, it would be difficult to prove that the sale of the most unexceptionable religious newspaper was an act of "necessity and charity."

The statute is very comprehensive and has sought to use terms which would embrace every article which could be sold in market. It prohibits the exposure and sale of all "wares, merchandise, fruit, herbs, goods or chattels." Everything which is the subject of property, and which may be exposed to sale, must be included under some or one of these terms. A newspaper is the subject of property, and when it is made the subject of sale in places opened for that purpose it is certainly merchandise. Newspapers are made merchandise when they are sold, either at wholesale or retail, as other articles are sold which have ever been usually regarded as merchandise. This mode of publication, by selling newspapers in large packages to be resold by the purchaser, or at retail and by the single paper, is of comparatively modern introduction; but as in this way the character of merchandise is given to the paper, the business of selling and exposing to sale the newspapers must be governed by the general laws affecting similar dealing in other articles of merchandise. It is exposing an article to sale that constitutes the offense, and not the character of the article, unless it is among the exceptions in the act. "Goods, wares and merchandise" include all movable property that is ordinarily bought and sold. "Chattels" is more comprehensive than "goods," and includes animate property. 2 Ch. Pl., 55, note r. The plain-

tiffs necessarily, in the performance of their agreement by the publication of the advertisement, violated the letter as well as the spirit of the act prohibiting the exposure of merchandise for sale on Sunday, and no action will lie upon such contract. In a sense it was a contract by the plaintiffs for the performance of servile work on the Sabbath. They agreed to publish and circulate the advertisement of the defendants on Sunday by delivering a copy to each of their customers who should buy of them a copy of their paper, and incidentally they agreed to expose for sale and sell on that day their paper containing the advertisement. This was servile work in the same sense that the service of the attorney's clerk was, or that of a salesman in a dry goods store would be. The contract was void, and the judgment must be affirmed.

All the Judges concurring.

Judgment affirmed.

CHAPTER X

OFFICIAL AND LEGAL ADVERTISING

1. **Introductory.**—The subject-matter of this chapter is in the main covered by legislation. The legislative regulations are so numerous and varied that any attempt to present them in detail would require, in itself, a volume of substantial magnitude. In variety, the items required by law to be published range all the way from notices of the time and place of the annual meetings of state boards of embalming, and summons to nonresident defendants in private litigation, to matters of such general interest as notices of elections and reports of public officials. In the matter of detail, the statutes cover such items as the kinds of newspapers in which the publishing may be done, the methods to be pursued in selecting official newspapers, the length of time during which the items are to be published, the regulation of charges, and even the kind of type to be used. For details, it is necessary, therefore, to refer the publisher to the statutes of his own state.

In the following pages the only attempt will be to cover in a more or less general way those matters as to which there is a fair measure of uniformity, and to indicate the types of problems that have arisen, together with the way in which the courts have dealt with them.

2. **Qualifications Commonly Prescribed.**—In order to qualify for official or legal advertising of any kind the publication must be: (1) A newspaper, (2) of general circulation, (3) published (and often printed) in a certain locality, (4) daily or weekly, and (5) sometimes of prescribed political faith. In some states it is provided further that the paper shall have been published for a certain minimum length of time, and shall have at least a certain number of bona fide subscribers. Occasionally there is a language prescription.

The following statutes are illustrative of the more common requirements:

(a) "Any summons, citations, notices of sheriff's sale, or legal advertisements of any description, the publication of which is now required by law, or which may hereafter be required by law may be published in any *weekly or daily newspaper of general circulation published in the county where the action*, suit or other proceeding is pending, or is to be commenced or had, or in which such notice, summons, citation, or other legal advertisement is required to be given: Provided, however, that if there be more than one newspaper fulfilling the requirements of this section in which any such legal notice, summons, citation, or legal advertisement of any description, including notices of sheriff's sale, might be lawfully published, then the plaintiff, or moving party in the action, suit or proceeding shall have the exclusive right to designate in which of such qualified newspapers such legal notice, summons, citation, notice of sheriff's sale, or other legal advertisement, shall be published.

"The term 'newspaper,' as used in this section, shall refer and apply to only such newspapers of general circulation made up of at least four pages of at least five columns each, and with type matter of a depth of at least seventeen and three-quarter inches, or if small pages then comprising an equivalent amount of type matter, which shall have *at least two hundred bona fide subscribers* living within the country in which the newspaper is published: Provided further, that *such newspaper shall have been established and regularly and uninterruptedly published in such county at least once a week during a period of at least twelve consecutive months immediately* preceding the first publication of such notice, summons, citation, notice of sheriff's sale or other legal advertisement."¹

(b) "In all cities having a population of more than one hundred thousand inhabitants a board consisting of the judges of the circuit court of such cities, or of the judicial circuit in which such city is situated, or a majority of the same, shall, on or before the first day of January, 1890, and

¹ Section 58, Or. L.

every two years thereafter, cause to be published in some daily newspaper of said city a notice of at least twenty days, designating when and where said board will receive sealed proposals from *daily newspapers published in said city* for the publication of all advertisements, judicial notices and orders of publication required by law to be made.”²

3. **Newspaper.**—In *Puget Sound Publishing Co. v. Times Printing Co. and City of Seattle*³ the Supreme Court of Washington quotes with approval the following definitions:

“Newspaper.—A paper containing news; a sheet containing intelligence or reports of passing events, issued at short but regular intervals, and either sold or distributed gratis. * * * ”⁴

“Newspapers may be classed as general, devoted to the dissemination of intelligence on a great variety of topics, which are of interest to the general reader, or special, in which some particular subject, as religion, temperance literature, law, etc., has prominence, general news occupying only a secondary place.”⁵

“A newspaper, in the popular acceptance of the word, is a publication issued at regular intervals, containing among other things the current news, or news of the day.”⁶

In *Kansas City v. Overton*⁷ is the following comment: “It [the paper in question] was issued at regular stated intervals, contained the current news and matters of general interest, including the local happenings of the city, and a great many proposals and notices concerning the grading and paving of streets and other works of internal improvements. Although the news was very limited in circulation, we think it must be held to be a newspaper, within the meaning of the statute.”

The Oregon Supreme Court⁸ says that “publications de-

² Section 591, Rev. St. Mo. 1909.

³ 33 Wash. 551, 74 Pac. 802. (1903).

⁴ Century Dictionary.

⁵ This definition is substantially the same as that given by the courts of various states.

⁶ 21 Am. & Eng. Enc. Law (2d Ed.) p. 533.

⁷ *Kansas City v. Overton*, 68 Kan. 560, 75 Pac. 549.

⁸ *United States Mortgage Co. v. Marquam*, 41 Or. 391, 69 Pac. 37, 41.

voted mainly to the promulgation of religious views and doctrines of a religious sect, or essentially to the dissemination of legal learning and literature, when devoting a portion of their columns to news matters of current and public interest have been held to come within the designation [of newspapers].”

A Minnesota statute⁹ provides that: “A newspaper in order to be qualified as a medium of official and legal publication shall * * * (3) contain general and local news, comment and miscellany, not wholly duplicating any other publication, and not entirely made up of patents, plate matter and advertisements.”¹⁰

4. General Circulation, Newspapers of.—It is usually provided by statute that official and legal publications shall be made, not merely in newspapers, but in newspapers of general circulation.

What does “general” mean? On the one hand, it does not mean “universal” either in point of interest or actual circulation. On the other hand, a paper cannot be too limited in its appeal or distribution and still qualify. It is a matter of degree. “That which would be a general circulation in a town of 5,000 or 10,000 people can hardly be said to be general in a populous city.” In holding that the ‘Noon Star,’ which was a noon edition of the ‘Evening Star’ of Seattle, was not a paper of general circulation, the Supreme Court of the state of Washington took occasion to point out that “it had no circulation in the residence districts, and was rarely seen, either in business houses or the offices of professional men.”¹¹

⁹ Minn. Gen. St. 1913, § 9413.

¹⁰ By way of contrast, see *Norton v. City of Duluth*, 54 Minn. 281, 56 N. W. 80, and *Tyler v. Bowen*, 1 Pittsb. R. (Pa.) 225, cited in 16 Ann. Cas. 417, in which it was held that a sheet of paper covered with advertisements and distributed gratuitously at the expense of the advertisers is not a newspaper, and *Beecher v. Stephens*, 25 Minn. 146, holding the *Northwestern Reporter* not a newspaper on the ground that it was a compilation of court decisions and did not purport to publish any news.

¹¹ *Times Printing Co. v. Star Pub. Co.*, 51 Wash. 667, 99 Pac. 1040, 16 Ann. Cas. 414, *infra*, p. 463; *United States Mortgage Co. v. Marquam*, 41 Or. 391, 69 Pac. 37, 41, held that the *Sunday Welcome*, with a circulation of 1,000 or 1,100 through the mails by delivery and by news stands, was a paper of general circulation in Portland, Or.

5. General Circulation—Special Trade Papers.—The papers which have given rise to special controversy have been those which make their principal appeal to special groups and limited classes. The field occupied by such papers may be so narrow as to make it quite obvious that the publication of notices and legal advertisements in them would not serve the purpose which the law, requiring publication, seeks to accomplish. As stated by the court in *Hanscom v. Meyer*¹² it would “be manifestly unjust, as well as against the letter and spirit of the law, to recognize such publications as proper for advertisements of legal notices—the object in all cases being to give wide and general publicity regarding the subject of which notice is required to be published.”

It has accordingly been held that papers which contain “advertisements, notices of conveyances of real estate, building permits, court dockets, and commissioner’s reports, *but no news of political, religious, commercial or social nature*” are not newspapers of general circulation.¹³ But the fact that such special matters greatly preponderate does not exclude the paper from the general circulation category.¹⁴ Thus in *Lynn v. Allen*¹⁵ the question whether “the Daily Reporter,” printed and published in the city of Indianapolis, having a circulation in the city of about 550 copies, and of about 2,500 copies outside of the city throughout the state, and published daily, except Sunday, was a “newspaper of general circulation” within the meaning of a statute providing for the service of process by publication in such a paper, was directly before the Supreme Court of Indiana; and the court held that it was a paper of general circulation, although it was devoted primarily to the general dissemination of legal news. However, it also included such matters as proceedings of the board of public works, daily records of property transfers, and one or more columns devoted to the general news of the day. In discuss-

¹² 60 Neb. 72, 82 N. W. 115, 48 L. R. A. 409, 83 Am. St. Rep. 507.

¹³ 16 Ann. Cas. 418; *Reagan v. Duddy*, 78 S. W. 430, 25 Ky. Law Rep. 1664.

¹⁴ *Hall v. City of Milwaukee*, 115 Wis. 479, 91 N. W. 998 (1902).

¹⁵ 145 Ind. 584, 44 N. E. 646, 33 L. R. A. 779, 57 Am. St. Rep. 223.

ing the question the court said: "By a 'newspaper of general circulation' the Legislature certainly did not intend a newspaper read by all the people of the county. As a matter of fact, every newspaper is in greater or less degree devoted to some special interest. No one, however, would claim that because a newspaper should, for example, be the organ of a certain political party, and especially devoted to the interests of such party, it would not, therefore, be a newspaper of general circulation. Yet such a newspaper is, to a large extent, read only by the members of the political party whose doctrines are advocated and expounded in its columns. There is no doubt that where a publication is devoted purely to a special purpose it would be an unfit medium to reach the general public. A medical, literary, religious, scientific, or legal journal is professedly but for one class, and that class but a comparatively small part of the whole population; and it would be manifestly unjust, as well as against the letter and spirit of the statute, to use such a journal for the publication of a notice affecting the property or personal rights of citizens in general. The newspaper before us, however, is no such professional or class journal. While it is a law publication in a certain sense, and of particular interest to the legal profession, yet its character, as shown by the evidence, makes it of general interest to the community at large, especially to that part of the community likely to be concerned with matters in courts and other public business. Indeed, it would seem that this newspaper is quite as likely as any party or other paper of general circulation to reach the particular persons interested in the proceeding before the court, and, consequently, that the spirit of the statute is quite as well served as could be if the notice were published elsewhere. Its special purpose is to give the news of the courts, and to circulate this news generally among all those, who, whether of the legal profession or not, may be interested in such proceedings. We are therefore unable to see how the end proposed in the statute, namely, to reach by publication a party interested in a suit in court, could be better attained than by publication in this newspaper."

6. **Place of Publication.**—Statutes frequently specify that the publication of an official or legal notice shall be in a paper published in a specific state, county, city, or town. Sometimes it is further provided that the printing, or a certain portion of it, shall also be done in the locality in question.¹⁶

In *Rose v. Fall River Five Cents Savings Bank*,¹⁷ the question was whether the notice of a mortgage foreclosure sale was published in the proper paper. The answer turned upon whether the *Dighton Rock* was published in the town of Dighton or in the city of Fall River. In Fall River a paper was published to which fifteen different names and date lines were given. One of these was called the *Dighton Rock*. It was entered at Fall River, and a number of copies were mailed from there to certain regular subscribers, but large packages were also sent to an agent in Dighton for sale and distribution there. The court (Holmes, J.) held that it was published in Fall River, not in Dighton, and observed: "Assuming that papers printed from the same type, with or without different names, might be published in different towns, within the meaning of the statute, in this instance all the fifteen heads of the Hydra had their homes in Fall River. The word 'published' is used in the statute, not quite in the same sense in which it might be used in libel, but refers to the home office of the paper. There was but one place of management, and the paper was given to the world from there, not only under its other names, but as the *Dighton Rock*, so far as it had regular subscribers."

An Illinois statute required the publication of proposed ordinances in a newspaper published in the city or village. The Illinois Supreme Court held that this statute was not complied with by publishing a proposed Morgan Park ordinance in a paper which stated that it was entered at the post office at Chicago. "A newspaper is published

¹⁶ *Kansas City v. Overton*, 68 Kan. 560, 75 Pac. 549; *Norton v. City of Duluth*, 54 Minn. 281, 56 N. W. 80.

¹⁷ 165 Mass. 273, 43 N. E. 93.

where it is first issued to the public. * * * It is immaterial where the printing is done, but the place of publication of a newspaper is the place where it is first put into circulation, where it is first issued to be delivered, or sent by mail, or otherwise, to its subscribers.”¹⁸

The phrase “printed and published” has also come before the courts for interpretation. In a case which arose in New Jersey, the matter for a certain newspaper was written, set up, and placed in the forms in Hoboken, where it was owned and conducted. The forms were then sent to New York, where the presswork was done. The papers were brought back to the Hoboken office, whence they were issued to subscribers. It was held that the paper was “printed and published” in Hoboken. The court said: “The composition of the matter, the setting of the type, and preparing the forms for the presswork constitute the substantial and important part of the printing. This work, in this case, being done exclusively in the office of the paper in Hoboken, with material and appliances owned and kept there, it is no misapplication of the statutory language to say that the printing of the Advertiser is in Hoboken, and that the paper is printed and published there.

“The strict interpretation of the words ‘printed and published’ upon which the prosecutor’s case rests would certainly exclude from the class in which judicial sales may be published, all papers with what is termed ‘a patent inside’ entirely made up in New York City.”¹⁹

7. Daily or Weekly Paper.—The general rule is that a paper need not be published seven days of each week to comply with statutes which designate “daily” papers. “The term ‘daily,’ as applied to the publication of newspapers, is relative. It has never been given the exclusive meaning of every day of the week, month, or year.” One day, and that not necessarily Sunday, may without doubt be omitted. And at least one case has held that a paper published on five

¹⁸ *People ex rel. v. Read*, 256 Ill. 408, 100 N. E. 230, Ann. Cas. 1913E, 293, and note.

¹⁹ *Bayer v. Mayor, etc., City of Hoboken*, 44 N. J. Law, 131, 133.

consecutive days of each week, omitting both Sunday and Monday, can qualify as a daily paper.²⁰

Statutes at times prescribe that daily means at least six days in each week.²¹

The definition of "weekly paper" has given no difficulty. "In ordinary acceptation, the expression 'weekly newspaper' unerringly conveys the idea of a paper issued once a week."²²

8. Political Faith of a Newspaper.—Occasionally, but not frequently, a statute will be found which requires that the newspaper which is designated as the official paper of the county shall have been one which supported the prevailing party at the last election. The application of such a statute presents difficulty at times in determining the political affiliations of the paper. The following test has currency:

"A newspaper, to be of a political party, must profess to be so or be so known. It is not sufficient that it has, while professing to be an independent newspaper, supported a political party."²³

In a recent New York decision it was held that the paper itself might qualify as the supporter of one party, notwithstanding the owner and editor personally supported a different party.²⁴

9. Language Restrictions.—The English language is the means recognized by our law for communication and information, and while a paper printed in a foreign language may be a newspaper, it is not necessarily nor logically a

²⁰ Fairhaven Pub. Co. v. City of Bellingham, 51 Wash. 108, 98 Pac. 97, 16 Ann. Cas. 420, and note.

²¹ Gen. St. Minn. 1913, § 9413; 3 Comp. St. N. J. 1709-1910, p. 3764, § 14. Any daily newspaper published in the state every day, Sunday excepted (including other qualifications), shall be deemed a newspaper qualified to publish all legal and official notices and advertisements.

²² Iowa State Sav. Bank v. Jacobson, 8 S. D. 292, 66 N. W. 453. A statute in Kansas provides that the publication of a legal notice once a week in a daily paper is allowable, if made in the Wednesday or Thursday issue. Gen. St. Kan. 1915, § 6007.

²³ 16 Ann. Cas. 420; R. C. L.

²⁴ People ex rel. Elmira Advertiser Ass'n v. Gorman (Sup.) 155 N. Y. Supp. 722, affirmed 169 App. Div. 891, 155 N. Y. Supp. 727, *infra*, p. 481.

newspaper within the meaning of a statute which is seeking to produce wide publicity in an English-speaking country. Unless, therefore, a statute prescribes a foreign language paper, it is held that publishing required by law shall be in English and in the English press.²⁵

In some states it is specially provided that legal notices shall be published in newspapers printed in the English language.²⁶

And occasionally it is required that certain notices in certain localities shall be published in German.

10. Restrictions on Rates.—Statutes fixing the rates that can be charged for official and legal publishing are widespread. These provisions are so numerous and so varied that it would be useless to attempt to give details.

Commonly it is a maximum rate that is set, but at times the amount is in terms made rigid. In Oregon, for example, after stating the rate for official and legal advertisements, it is provided that nothing in the act shall preclude the making of a contract for a lower rate.²⁷

Whereas, in North Dakota, the law reads that "in all cases where publication of legal notices of any kind is required or allowed by law, the person or officer desiring such publication shall be required to pay seven cents per counted line of nonpareil type," etc.

Where the compensation has been rigidly set by statute it has been held that a contract between a public officer and a printer to change the rate, even by lowering it, is void, and that the printer may recover the statutory allowance.²⁸

11. Official Newspaper.—Official newspapers are those which are selected by public officers or boards, such as county or circuit judges, county commissioners or supervisors, and city councils, in accordance with legislative authority,

²⁵ *Tyhee v. Hyde*, 60 Fla. 389, 52 South. 968; *Perkins v. Board of Com'rs of Cook County*, 271 Ill. 449, 111 N. E. 580, Ann. Cas. 1917A, 27 *infra*, p. 487.

²⁶ 3 Comp. St. N. J. 1709-1910, p. 3764, § 13.

²⁷ Laws Or. 1921, p. 104.

²⁸ *Hoffman v. Chippewa County*, 77 Wis. 214, 45 N. W. 1083, 8 L. R. A. 781, *infra*, p. 488. See, also, 20 R. C. L. 211.

in which public acts, resolves, advertisements, reports, and notices are required to be printed.²⁹

The selection of the official paper must be made strictly in accordance with the law, and the decisions of officers and boards are reviewable in the courts at the instance of defeated applicants.³⁰

While there is some dispute in the authorities, the better rule probably is that an official body cannot designate an official newspaper for a period that will encroach upon the prerogatives of its successors, and likewise that it cannot make contracts to extend beyond the time for which the board is organized.³¹

Where a statute prescribes the particular manner in which an official newspaper shall be designated, public funds cannot be used to pay for an official advertisement in a paper that has not been designated in the statutory manner.³²

12. Determination of Circulation.—Frequently the law requires that the official printing, or certain kinds of official printing, shall be given to the newspaper having the largest number of bona fide yearly subscribers within the city or county, as the case may be. The statute may prescribe methods for conducting a contest, as by providing that in case thereof the applicants shall each deposit with the official who has the power of decision a sworn statement giving names, addresses, and number of bona fide yearly subscribers.³³

The statute may or may not define what is meant by "bona fide yearly subscriber." The Oregon Code does de-

²⁹ *Board of Com'rs of Albany County v. Chaplin*, 5 Wyo. 80, 37 Pac. 370; *Shelden v. Board of Com'rs of Butler County*, 48 Kan. 356, 29 Pac. 759, 16 L. R. A. 257.

³⁰ *People ex rel. Press Pub. Co. v. Martin*, 142 N. Y. 228, 36 N. E. 885, 40 Am. St. Rep. 592; *Times Printing Co. v. Star Pub. Co.*, 51 Wash. 667, 99 Pac. 1040, 16 Ann. Cas. 414; 22 R. C. L. 207; *Young v. Rann*, 111 Iowa, 253, 82 N. W. 785. But compare *People ex rel. Republican & Journal Co. v. Wiggins*, 199 N. Y. 382, 92 N. E. 789, and *People ex rel. Utica Sunday Tribune Co. v. Williams*, 200 N. Y. 525, 93 N. E. 1129.

³¹ *Shelden v. Board of Com'rs of Butler County*, 48 Kan. 356, 29 Pac. 759, 16 L. R. A. 257, *infra* p. 491; 20 R. C. L. 209.

³² *Fagen v. City of Hoboken*, 85 N. J. Law, 297, 88 Atl. 1027.

³³ *Code Iowa*, § 441; *Laws Or.* 1921, pp. 103, 104.

fine this term as "one who has been a subscriber for an uninterrupted period of twelve months, or has paid his subscription for a period of twelve months;"³⁴ whereas the Iowa Code omits the definition. Where the question was presented to the Iowa court, it held that, if one has actually subscribed for the paper for a year, he is a yearly subscriber, although he has not taken the paper for more than a month.³⁵

13. Proof of Publication.—In all states, legislative provision will be found for the publication of various kinds of legal notices, such as summons, citations, notices of sheriff's sales, etc. In all such cases the newspaper is required to furnish proof of publication for the period and in the manner prescribed by the law. The proof is in the form of an affidavit by some one connected with the paper. The statutes prescribe what person or persons may make the affidavit. For example, in Illinois, it may be made by the publisher or his authorized agent;³⁶ in Kansas, by the printer, or his foreman or principal clerk, or other person having personal knowledge;³⁷ in Missouri, by the printer or publisher;³⁸ in Oregon, by the printer, or his foreman or his principal clerk.³⁹

No task of the printer calls for greater care than that of publishing official and legal notices and making the proof thereof. In no instance is a slip fraught with greater disaster to those whom he would serve.

If the task be the publication of a summons, where the defendant is absent from the state, the jurisdiction of the court to render a valid judgment in the case hinges, not only upon a publication strictly in accord with the statutory regulations, but also upon the making of an affidavit in

³⁴ Laws Or. 1921, pp. 103, 104.

³⁵ *Young v. Rann*, 111 Iowa, 253, 82 N. W. 785. See *City of Toledo v. Babcock*, 33 Ohio Cir. Ct. R. 29, to the same effect holding that "bona fide paid circulation," as used in the Ohio statute (Gen. Code, § 4228), includes "bona fide subscriptions," whether paid in advance or not.

³⁶ Hurd's Rev. St. 1919, c. 100, § 1.

³⁷ Gen. St. Kan. 1915, § 6972.

³⁸ Rev. St. Mo. 1909, § 590.

³⁹ Or. L. § 62.

similar strict accord with the statute. In publishing notices to creditors in the settlement of estates, slips affect the title to property throughout succeeding generations.

A few cases will illustrate more forcibly than words the need for care. An affidavit by one who designated himself as the chief clerk of the "publisher" was held not to satisfy the Oregon statute, which requires that the affidavit of publication be made by the "printer" or his foreman or chief clerk. This return rendered the judgment in the case invalid.⁴⁰

In another Oregon case, the judgment was upset because the affiant did not make affidavit to his connection with the paper. He described himself as "editor," but did not swear that he was editor. Says the court, "Conceding that 'editor' is within the spirit of the provision, as held in *Neff v. Pennoyer*, supra,⁴¹ it will be observed that the affiant swears to nothing except the matter set forth after the word 'say.'" His affidavit was as follows: "C. P. Crandall, editor of the Oregon Statesman, newspaper published at Salem, weekly, in said county and state, being sworn say that the above notice to R. B. Odell has been published in said newspaper for six successive weeks beginning June 26th, 1863."⁴²

SECTION 1.—WHAT IS A NEWSPAPER?—WHAT IS A NEWSPAPER OF GENERAL CIRCULATION?

TIMES PRINTING CO. v. STAR PUB. CO.

(Supreme Court of Washington, 1909. 51 Wash. 667, 99 Pac. 1040, 16 Ann. Cas. 414.)

Appeal from a judgment of the superior court for King county, upon findings in favor of the plaintiff, in an action to enjoin the letting of a contract for city printing. The judgment for the plaintiff was affirmed on appeal.

⁴⁰ *Osburn v. Maata*, 66 Or. 558, 135 Pac. 165 (1913).

⁴¹ *Pennoyer v. Neff*, 95 U. S. 714, 721, 24 L. Ed. 565, held that an affidavit by the "editor" satisfied the Oregon statute.

⁴² *Odell v. Campbell*, 9 Or. 298, 306.

GOSE, J.⁴³ This is an action brought by the respondent [plaintiff] against the defendants and appellant to enjoin the defendants from entering into a contract with appellant to do the city printing of the city of Seattle for the year 1909. The city of Seattle, a city of the first class, is acting under an independent charter. The charter provides for the printing of all municipal legal notices, the manner of awarding contracts therefor, and for the designation of the city official newspaper. Section 31 of article 4 of the charter prescribes that such newspaper must be "a daily newspaper of general circulation and published in the city, to be styled city official newspaper." Such section further provides that the board of public works shall on the first Monday of August of each year cause to be published a call for sealed proposals to do the city printing for the then next ensuing fiscal year. In obedience to this provision the board caused such notice to be published, and on August 10, 1908, the appellant filed its bid in every way in compliance with the charter provision, proposing to publish in the Noon Star "all the city printing" for the next fiscal year. On August 29th all the bids, five in number, were opened, and the bid of the appellant, it being the lowest bidder, was accepted by the board. On October 11th the case was tried to the court, which found that the Noon Star is only a preliminary or special edition of a newspaper called the "Seattle Star," and is not a newspaper on its own account, and enjoined the parties from entering into the contract. From this order this appeal is prosecuted.

Two principal points are urged: First, that the Noon Star is an edition of a newspaper, and not a newspaper proper; second, that it is not a newspaper of general circulation within the meaning of the charter provision. We will consider these points in the order stated.

The Noon Star is issued regularly every day, is an eight-page paper, 18 by 23 inches in size, with eight columns to the page, and contains telegraphic, sporting, political, and theatrical news and advertisements, and has an editorial column. The Star Publishing Company published both the Seattle Star and the Noon Star. Prior to June 20, 1908, the Noon Star was known as the "Noon Edition of the Evening Star" and was principally devoted to sporting news. The evidence shows that at the time of filing its bid the Noon Star had no regular subscription list, but that about 1,000 papers were sold daily on the streets by newsboys. At the time of the trial it had a subscription list of 360 and an average daily

⁴³ The dissenting opinions of Fullerton and Chadwick, JJ., are omitted.

circulation of 1,083. In view of these facts we do not regard it as important whether it was an edition of the Evening Star or an independent newspaper. Its size, the regularity of its issuance, and the variety of its news were such as to make it clear that it was a newspaper at the time it submitted its bid, and the fact that it contained news some of which was published the previous day in the Evening Star does not militate against this view. This court in the case of Puget Sound Publishing Co. v. Times Printing Co., 33 Wash. 557, 74 Pac. 804, quoted with approval the following definition of a newspaper: "A newspaper, in the popular acceptance of the word, is a publication issued at regular stated intervals, containing, among other things, the current news, or the news of the day. 21 Am. & Eng. Ency. Law (2d Ed.) p. 533." In *Hanscom v. Meyer*, 60 Neb. 68, 82 N. W. 116, 48 L. R. A. 409, 83 Am. St. Rep. 507, the court say: "The principal distinguishing feature of a newspaper, in contemplation of the statute, in our opinion, is that it be a publication appearing at a regular, or almost regular, intervals, at short periods of time, as daily or weekly, usually in sheet form, and containing news; that is, reports of happenings of recent occurrence of a varied character, such as political, social, moral, religious, and other subjects of a similar nature, local or foreign, intended for the information of the general reader." In *United States Mortgage & Trust Co. v. Marquam*, 41 Or. 391, 69 Pac. 37, 42, this language was used: "Mr. Justice Mitchell, in *Hull v. King*, 38 Minn. 349, 350, 37 N. W. 792, 793, in attempting to give a very general definition of a newspaper, says that according to the business world, and in ordinary understanding, it is 'a publication, usually in sheet form, intended for general circulation, and published regularly at short intervals, containing intelligence of current events and news of general interest.'" See, also, *Williams v. Colwell*, 14 App. Div. 26, 18 Misc. Rep. 399, 43 N. Y. Supp. 720, 1167.

We next pass to the consideration of the second question, viz., was it a newspaper of general circulation at the time of the filing and acceptance of its bid? The evidence, as we have said, shows that about 1,000 copies were daily sold on the streets by the newsboys, and that at the time of the acceptance of the bid it had no subscription list, and that at the time of the trial, some two months later, it had a subscription list of 360 and an average daily circulation of 1,083. Furthermore, it appeared that at the time of the acceptance of the bid it had no circulation in the residence districts and was rarely seen either in business houses or the offices of professional men. In September, 1907, the city of Seattle had a population of 242,000 according to the "review of the re-

sources and industries of Washington" issued under the auspices of the state. At the time of the acceptance of the bid it had a population of about 275,000. We think we may take judicial notice of this fact. The rule in respect to judicial notice is stated in 16 Cyc. 870, as follows: "The court will take judicial notice of the population of counties, cities, and towns, and of the approximate rate at which the population of such places increase." See, also, *Pacific Railway Co. v. Montgomery*, 49 Neb. 485, 68 N. W. 621. The controlling purpose of the city in letting a contract of this nature is to give the public notice of certain of its official and proposed official acts. Webster defines the word "general" as being equivalent to extensive. It is a relative term, and its meaning must be determined by a process of inclusion and exclusion. That which would be a general circulation in a town of 5,000 or 10,000 people can hardly be said to be general in a populous city.

The appellant urges, however, that this question has been settled favorably to its contention in the case of *Puget Sound Publishing Co. v. Times Printing Co.*, supra. We think the two cases are distinguishable. The former case was decided in 1903, when the population of Seattle was estimated at 121,813 according to the "review of resources," supra. At pages 555 and 556 of 33 Wash., at page 803 of 74 Pac., the court in discussing this question uses the following language: "The court further found: That the Bulletin circulates among all classes of people in the city of Seattle; that it has between 750 and 1,000 subscribers in the city of Seattle, and is daily delivered to such subscribers, with the exception of legal holidays, and is daily read in the city of Seattle by about 3,000 persons; that it daily contains a résumé of the world's telegraphic news, briefly stated; that it contains an editorial column devoted to the discussion of events and topics of interest to the general public; that it has been, by order of the superior court of King county, frequently designated as, and declared to be, a newspaper of general circulation; that for more than three years notices of all classes, required by law to be published in a newspaper of general circulation, have been published regularly in the Bulletin, among which appear summons for publication, foreclosure notices, all manner of probate notices required by law to be published, notices of foreclosure of delinquent tax certificates, and all other such notices as are usually found in a newspaper of general circulation; and that in each instance an order of the superior court of King county has declared the Daily Bulletin to be a newspaper of general circulation in King county. The testimony introduced at the trial, and the copies of the

paper sent up as exhibits, seem to support the findings of the court as to the character of the Daily Bulletin." An examination of the language quoted will show the difference in the kind and extent of circulation. The Bulletin had a regular list of subscribers and was read by 3,000 people. There is no evidence in the case at bar that the Noon Star was read by more than 1,000 people. The circulation of the Bulletin was general among the people. The circulation of this paper is confined to those who buy it from the street. For more than three years the Bulletin had published all kinds of legal notices which the law required to be published. Our attention has not been called to the fact that any such publication has been made in the Noon Star.

In the case of *Norton v. City of Duluth* (Minn.) 56 N. W. 80, also relied upon by the appellant, the statute defined the qualification of a newspaper for doing official printing as one regularly issued, published, and delivered to 240 paying subscribers. In the case of *Pentzel v. Squire*, 161 Ill. 346, 43 N. E. 1064, 52 Am. St. Rep. 373, cited in the appellant's brief, it was shown that the paper circulated among "lawyers and laymen" and had an average weekly circulation of 3,875. In *United States Mortgage & Trust Co. v. Marquam*, 41 Or. 391, at page 42 of 69 Pac., the court uses the following language: "The circulation of the Sunday Welcome through the mails, by delivery, and by news stands is from 1,000 to 1,100 copies, and is not confined to any particular class or sect of individuals." This case was decided in 1902. In *Williams v. Colwell*, supra, the court was considering the question as to whether the publication was in a newspaper within the meaning of the law, and at page 721 of 43 N. Y. Supp., at page 27 of 14 App. Div., at page 400 of 18 Misc. Rep., said: "And that it has a circulation in the city of Buffalo of 1,000, and in the county outside the city of 500, and in other parts of the state of New York and in 24 other states and the province of Ontario, Canada, of 3,600." Neither the Oregon statute nor the New York statute in direct terms require a paper to have a general circulation.⁴⁴ However, the courts in construing them assume that this is an implied qualification.

In view of the charter provision requiring that the paper selected shall be one of general circulation, the purpose of the publication of official notices, the population of the city of Seattle at the time of the acceptance of the proposal, and treating the word "general" as being equivalent in meaning with extensive, and giving to this word a reasonable interpretation, we are constrained to hold that the Noon Star was not

⁴⁴ This is incorrect as to the Oregon statute. See Or. L. § 58.

a newspaper of general circulation at the time of the acceptance of its proposal to do the city printing. Indeed, we could not reach a different conclusion without unduly restricting the meaning of the word "general."

This conclusion requires an affirmance of the judgment, and it is so ordered.

RUDKIN, C. J., and DUNBAR, CROW, and MOUNT, JJ., concur.

FULLERTON and CHADWICK, JJ., dissent.

HALL v. CITY OF MILWAUKEE et al.

(Supreme Court of Wisconsin, 1902. 115 Wis. 479, 91 N. W. 998.)

It is provided by the charter of Milwaukee (chapter 3, § 9) that preceding the first Tuesday in April of each year the council shall require the city clerk to advertise for proposals to do the advertising for the city of all ordinances, notices, etc., required to be published in a newspaper, gives direction for filing the bids, and provides: "No bids shall be considered by said clerk except from a daily newspaper which has been published in said city at least two years consecutively next before the date of the bid." After opening the bids, the clerk is required to tabulate them, and report to the city council, which body is required by resolution to designate and award such advertising to the newspaper which shall offer to do such advertising "at the lowest price for the year then ensuing," and is also required to designate such newspaper so receiving the contract as the proper official newspaper of said city. In ostensible compliance with this section, the city clerk, in March, 1902, advertised for bids, and, after certain bids had been refused, resolution accepting one thereof had been vetoed by the mayor, and all such bids rejected as too high, further bids were received, among which, material to this case, were those of the Reporter Publishing Company at 8 and 7 cents for first and subsequent insertions, respectively, and of the News Publishing Company at 14 and 16 cents for first and subsequent publications. Thereupon the council, by resolution, awarded the contract to the News Publishing Company, and designated the Milwaukee Daily News as the official English newspaper of the city. Such resolution, being vetoed, was passed over the mayor's veto, and a contract in accordance therewith in form executed. The plaintiff, as a taxpayer, brought suit to adjudge such contract void, and enjoin the city from incurring any liability thereunder; asserting its invalidity on the ground that the News Company had not bid the lowest price for the

work, but that the Reporter Publishing Company had bid lower. The defense presented is to the effect that the paper published by the latter is not a newspaper within the meaning of the charter requirement.

The court found as a fact "that the Daily Reporter is a daily newspaper, and ever since the 1st day of January, 1899, has been, and now is, printed daily in English, and published in the city of Milwaukee." It is also found that the Reporter is an 8-page paper, 18 by 12 inches, published in two editions, one in the morning and one in the afternoon, the morning edition containing the eight pages and the afternoon only four; that the morning edition has a daily and bona fide paid circulation of 375 copies per day in the city and county of Milwaukee; that the afternoon edition has a circulation of 578 copies, out of which 210 are daily sent to individual paying subscribers in various parts of Milwaukee and other counties of the state and outside the state, and 368 copies are daily sent to parties throughout the United States upon subscriptions made by local commissionmen and dealers in the city of Milwaukee who desire to have said paper sent to customers and other persons in the country with whom they deal; that the afternoon edition, among other matters, contains daily news of the daily markets in grain, as shown by the transactions on the boards of trade of Milwaukee, Chicago, New York, and other cities in the United States and abroad, the movements of grain, financial quotations from the chief money exchanges, a review of live stock and other markets, a list of judgments entered in the courts of Milwaukee county and of satisfactions thereof, a statement of mechanic's liens filed or released, and of all conveyances filed with the register of deeds of Milwaukee county, chattel mortgages filed with the city clerk of the city of Milwaukee and releases thereof, time-tables of the railroads in Milwaukee, quotations showing the prices upon the various produce markets in the city of Milwaukee, notices ordered to be published by Milwaukee courts, sheriffs' sales, and general advertisements of merchants and business men in the city of Milwaukee, besides items of general interest and news to the public at large; that the morning edition contains, in addition, news items of the daily happenings of all the courts in Milwaukee county, a list of causes upon the daily calendars in said courts for the ensuing day, a statement of the doings for the day in bankruptcy court; and also all the matter contained in the evening edition of the night before; the weather report and forecast, a statement of what buildings are being planned for erection, with the names of architects and general character and description of buildings which are being erected, and advertisements attractive to the general public; and also con-

tains, in varying quantities, sometimes more than a column, so-called "plate matter," being information and news concerning matters of general interest to the public at large; and also contains matters and items of general news and information beyond those above referred to, many legal notices (of which some 3,000 have been published since the commencement of said paper), and that there has been published in said paper the notice of tax sale for delinquent taxes in the year 1901; also that the morning edition of the Daily Reporter circulates generally among all classes of professional and business men in the city and county of Milwaukee. Such finding is in some respects assailed, as will appear more fully in the opinion. The court held that the Daily Reporter is a newspaper within the designation of the charter, hence that the bid of the News Company was not the lowest, and accordingly adjudged void the contract with the latter, and perpetually enjoined the city of Milwaukee and its officers from creating any liability with reference to publication of any ordinances, etc., in the Milwaukee Daily News, and from delivering any such ordinances to the News Publishing Company for publication, and from paying to it any money under said contract, or issuing city orders or warrants for any work done thereunder; from which judgment the defendant appeals.

DODGE, J. While the findings of fact, of which the substance is given in the foregoing statement, are perhaps in no respect wholly unsupported by evidence, they are at least capable of conveying a somewhat exaggerated conception both of the information and news of interest to the general public contained in the Daily Reporter, and the extent to which it circulates generally among professional and business men. We need not, however, devote space to the detail of such facts. The general result is the same, namely, that the Reporter addresses itself to special fields of circulation and of news, and is, of course, widely different, both in contents and circulation, from the great daily newspapers, as they are known to the general public. It is, in brief, what its name indicates, a law and business reporter, reaching but a few hundred out of the hundreds of thousands of population of Milwaukee, and yet it cannot be said to fail of compliance with most of the recognized legal definitions of a "newspaper," among which are: *Rap. & L. Law Dict.* "A periodical publication containing intelligence of passing events." *Black, Law Dict.* "A publication in numbers, consisting commonly of single sheets, and published at short and stated intervals, conveying intelligence of passing events." *Am. Enc. Dict.:* "A printed paper published at intervals, * * * containing intelligence of past, current, or coming events, and, at the option of the conductors, presenting

also expressions of opinion by editorial and other contributors, and business announcements and advertising." 21 Am. & Eng. Enc. Law (2d Ed.) p. 533: "A publication issued at regular stated intervals, containing, among other things, the current news, or the news of the day." Other definitions, but to substantially the same effect, will be found in the opinions of courts hereafter to be cited.

Doubtless the term "newspaper," used in different surroundings, may have different meanings, and, could we approach the question as *res nova*, we confess to be strongly inclined to the view that the object of the Milwaukee charter requiring publications of its ordinances, notices, etc., was to obtain so much of publicity as to require a medium of publication broader and more comprehensive than the one now before us; but we discover in that legislation another purpose, much more carefully guarded, and which we cannot but believe to have been a dominant one, namely, that of withholding from the council of Milwaukee anything of discretion or favoritism in the selection of the medium in which such publications should be made. The Legislature might, as it did in providing for the publication of summons, require the newspaper to be selected in discretion as that most likely to give information. It might have placed a minimum limit upon the quantum of circulation, or required selection of the paper offering lowest price per 1,000 circulated. It might, indeed, have drawn a line as to the contents of the paper which would have excluded merely trade or professional journals. But it did none of these things. It required that the publications should be had merely in that newspaper which would make the lowest price. Hence, in the nature of things, the dominant purpose could not have been to secure the widest publication; for, necessarily, the price must be largely affected by the number of papers circulated. It costs more to supply the paper for, and to print and distribute, 30,000 newspapers, than it does 5,000; also the space is salable to advertisers for more. So no one of business sense could expect that, other things being equal, a paper with the former circulation would offer to publish these ordinances and notices as cheaply as one of the latter. Hence we derive the inference, above stated, that the purpose to accomplish the widest publicity was subordinate to that of restraining the council from discretion or favoritism, and requiring it to adopt the medium according to the price offered, so long as that medium fell within the definition of the word "newspaper," even without the qualification imposed in many statutes that it should be of general circulation; and that this latter purpose so dominated in the mind of the Legislature as to require the selec-

tion of even such a sheet as the Reporter, if it is within the recognized meaning of the word "newspaper." If such was the legislative intent, it is not for the court to weigh or consider the wisdom or otherwise of the legislation. For that we are not responsible. If it is unwise, the Legislature had a right to make it so, and has at all times a right to change it.

We cannot, however, consider the significance of the word "newspaper," even in this legislation, as an entirely new and original question; for, while this court is not definitely committed on the subject, the word has so many times received construction by courts of other states under circumstances so closely approximating those now present that we cannot properly refuse consideration to the force of such decisions, which, upon examination, prove to be overwhelmingly in favor of the inclusion of such a paper as this Reporter within the legal term "newspaper." Those at least tending in that direction are the following: *Lynch v. Durfee*, 101 Mich. 171, 59 N. W. 409, 24 L. R. A. 693, 45 Am. St. Rep. 404; *Lynn v. Allen*, 145 Ind. 584, 44 N. E. 646, 33 L. R. A. 779, 57 Am. St. Rep. 223; *Kerr v. Hitt*, 75 Ill. 51; *Hernandez v. Drake*, 81 Ill. 34; *Maass v. Hess*, 140 Ill. 576, 29 N. E. 887; *Railton v. Laudor*, 126 Ill. 219, 18 N. E. 555; *Pentzel v. Squire*, 161 Ill. 346, 43 N. E. 1064, 52 Am. St. Rep. 373; *Kellogg v. Carrico*, 47 Mo. 157; *Benkendorf v. Vincenz*, 52 Mo. 441; *Kingman v. Waugh*, 139 Mo. 360, 40 S. W. 884; *Hull v. King*, 38 Minn. 349, 37 N. W. 792; *Norton v. City of Duluth*, 54 Minn. 281, 56 N. W. 80; *Hanscom v. Meyer*, 60 Neb. 68, 82 N. W. 114, 48 L. R. A. 409, 83 Am. St. Rep. 507; *Turney v. Blomstrom* (Neb.) 87 N. W. 339; *Hurt v. Cooper*, 63 Tex. 362, 367; *Meyer v. Opperman*, 76 Tex. 105, 109, 13 S. W. 174; *Williams v. Colwell* (Sup.) 43 N. Y. Supp. 720; *Bigalke v. Bigalke*, 19 Ohio Cir. Ct. Rep. 331; 4 Op. Atty. Gen. U. S. p. 10.

The only decisions tending to exclude special or class journals from designation of newspapers for purpose of statutory publication are *Beecher v. Stephens*, 25 Minn. 146; *In re Charter Application*, 11 Phila. 200; *Crowell v. Parker*, 22 R. I. 51, 46 Atl. 35, 84 Am. St. Rep. 815. *Beecher v. Stephens* held the *Northwestern Reporter* not a newspaper. That publication is so well known to the profession that we hardly need to suggest its distinction from such papers as this before us. The *Northwestern* does not purport to publish news, but the opinions of various courts. It is a compilation of decisions of courts. In *Re Charter Application* the publication was required by law to be in "two newspapers of general circulation," and it was held that the *Legal Intelligencer*, mainly confined to the legal profession, did not satisfy that re

quirement. *Crowell v. Parker* was a publication of notice of sale under a power contained in a mortgage requiring publication in a public newspaper. The court held that the Real Estate and Rental Guide would not satisfy that contract requirement, mainly for the reason that the publication clause in this mortgage had been in use for many years, and had always been understood and construed by practice to require publication in the ordinary general newspaper, and that the instance before the court was the first one known of an attempt to publish in a trade or special journal. The court, therefore, considered many of the decisions hereinabove cited as not applicable. With the exception of the three cases last referred to, the decisions above cited all tend to the inclusion of special trade, commercial, religious, or scientific journals within the designation "newspaper," where used in statutes regulating publication of either municipal or legal notices. The courts of Illinois, Indiana, Michigan, Missouri, Nebraska, New York, and Ohio have so decided in favor of legal publications addressing themselves especially to lawyers, and devoting their columns primarily and mainly to the publication of events transpiring in courts, on markets, or amongst conveyancers. Many, if not most, of the legal journals considered bore very close resemblance to that now before us, the distinctions being wholly in detail or in degree, and in no respect in principle. Other publications have also been included; such, for example, as one confined principally to news of corporations, known as the National Corporation Reporter, a daily mercantile reporter, religious weeklies, and others special both in their circulation and matter.

From this overwhelming array of judicial opinion we cannot avoid the conclusion that a publication is deemed a newspaper in the legal sense although it does not attempt to publish all the news. Indeed, it may probably be said that hardly any, even of our broadest daily journals, do publish all the events transpiring. Matters will be found in one which are not in another; sometimes by accident, more often by reason of the system or policy of the journal itself. The difference is only in degree between such papers and those which, of definite policy, confine themselves mainly to those events which are of special interest to a limited class, thus bringing that particular phase of the news more conveniently before the class so interested in it. When this field is once entered, the difficulty of drawing any scientific line is obvious, and we cannot believe that the Legislature intended to pass over to the common council discretion to say that, because one paper did not publish fully certain complexions of political news, or of sectarian and religious news, or adequate description of sporting

events, or otherwise limited its field of news, it should be excluded from the rank of competing newspapers. On the contrary, we are convinced that the charter provision in question can only be enforced by giving to the word under discussion therein the meaning which has been given to it by courts all over the country, and thus holding that the Daily Reporter is a newspaper within its terms; that, its bid being the lowest, the council had no discretion or power to accept any other bid; and that the attempted contract set forth in the complaint in this action, founded upon such other and higher bid, was prohibited, so that the city should be enjoined, at the suit of a taxpayer, from subjecting the city treasury to any liability thereon. That is the substance and effect of the judgment appealed from, which, therefore, should not be disturbed.

Judgment affirmed.

[The holding, therefore, is that the Daily Reporter was a "newspaper," and hence that its bid should have been considered. It will be noted that the ordinance did not require that the paper be one of "general circulation."]

In re GREEN.

(District Court of Appeal, Third District, California, 1913. 21 Cal. App. 138, 131 Pac. 91.)

PLUMMER, J. This is an appeal from an order of the superior court denying the petition of the appellant that the Daily Recorder, a paper published in the city of Sacramento, state of California, be ascertained and established as a newspaper of general circulation, as that term is defined in section 4460 of the Political Code.

The petition sets forth, in substance, that the Daily Recorder is a newspaper published for the dissemination of local and telegraphic news and intelligence of a general character; that said paper has been established, published, printed, and circulated at regular intervals, to wit, every day except Mondays and legal holidays in the city and county of Sacramento, state of California, for more than one year preceding the filing of the petition; that said newspaper is not devoted to the interests or published for the entertainment or instruction of any particular class, profession, trade, calling, race or denomination, or for any number of such classes, professions, trades, or callings, etc.; and, further, that such newspaper has a bona fide subscription list of paying subscribers.

The testimony set forth in the bill of exceptions is with-

out conflict, and is to the effect that the Daily Recorder has been published daily, except Mondays as hereinbefore stated, in the city of Sacramento for a period exceeding one year preceding the filing of the petition; that said paper publishes local and telegraphic news and intelligence of a general character; that its telegraphic news is obtained from other Sacramento evening papers; that the greater part of the local news published by the Recorder consists of the daily report of documents recorded in the offices of the recorder of Sacramento county, the proceedings of the superior court of said county, also other general news of a local nature; that the subscription list of paying subscribers to said paper somewhat exceeds the number of 200; that its subscribers consist of bankers, wholesale liquor houses, brokers, furniture dealers, saloons, fire insurance companies, retail grocers, wholesale glass and paint companies, carpenters, wholesale cement and lime companies, builders and contractors, millmen, automobile dealers, manufacturers, real estate dealers, private residents, barbers, attorneys at law, doctors, title companies, mercantile agencies, fruit exchanges, architects, collection companies, plumbers, dealers in hops, and bond and mortgage companies, the largest classes represented among the bona fide paying subscribers being lawyers and real estate firms; and that it is not the avowed purpose of said Recorder to entertain or instruct any particular trade, calling, race or denomination, or any number of such classes.

A copy of the paper issued under date of March 17, 1912, is attached to the transcript and made a part thereof. In this copy there appears a list of the documents recorded on the preceding day in the office of the county recorder of Sacramento; a statement of the collections made by the city collector of Sacramento for the preceding week; an account of a doctor's banquet; a notice that a realty firm has taken new quarters; a list of the building permits issued on the previous day; a requisition issued by the Governor; an account of the erection of a second-class hotel; an item relating to the action of the grand jury of said county; a statement of bank clearances; a few personal notices; the trial calendar of the various departments of the superior court of Sacramento county for the following day; also the superior court proceedings for the preceding day; a short item as to the action of the chamber of commerce; an account of the annual meeting of the Sacramento Valley Development Association; an item in relation to an understanding reached by the Retail Merchants' Association providing for the installation of electroliers; a report from the county clerk's office of the marriage licenses issued; two items as to new buildings; a résumé of seven

decisions reported in the National Reporter System relating to real estate and matters affecting the title thereto; a report of the action of the Sacramento center of the California Civic League, of interest to women voters; an account of the activity of the members of Congress from California and what they are doing in Washington; a list of real estate dealers, attorneys at law, contractors and builders, plumbers and gas-fitters, garages and machine works and the members of the Master Painters' Association, together with several other items not necessary to further specify, as well as a small number of general advertisements.

Upon this testimony the trial court found that said Daily Recorder is not a newspaper published for the dissemination of local or telegraphic news or intelligence of a general character, and, further, that said newspaper is devoted to the interests of and is published for the instruction of particular classes, to wit, members of the legal profession and real estate agents; that it is the avowed purpose of said newspaper to entertain and instruct said classes. These findings of the court are attacked as being contrary to the evidence.

Section 4460 of the Political Code defines a newspaper of general circulation to be a newspaper "published for the dissemination of local or telegraphic news and intelligence of a general character, having a bona fide subscription list of paying members, and which shall have been established, printed and published at regular intervals in the state, county, city, city and county, or town where such publication, etc., * * * is had; a newspaper devoted to the interests or published for the entertainment or instruction of a particular class, profession, trade, calling, race or denomination or for any number of such classes, professions, trades, callings, races or denominations when the avowed purpose is to entertain or instruct such classes is not a newspaper of general circulation." This section does not provide that in order for a newspaper to be established as a newspaper of general circulation it shall publish both local and telegraphic news. The language of the Code is, "local or telegraphic news and intelligence of a general character."

Does the Daily Recorder properly come within the definition of the Code and is it a newspaper of general circulation? As to whether it is such a newspaper is manifestly a matter of substance and not merely of size; and that it is of general circulation must largely depend upon the diversity of its subscribers rather than upon mere numbers. There are doubtless many strictly literary, scientific, religious, medical, and legal journals which have a large number of subscribers, but are not of general circulation, being published for the informa-

tion, respectively, of such particular classes. And, as said in *Hanscom v. Meyer*, 60 Neb. 72, 82 N. W. 115, 48 L. R. A. 411, 83 Am. St. Rep. 509: "It would be manifestly unjust, as well as against the letter and spirit of the law, to recognize such publications as proper for the advertisement of legal notices—the object in all cases being to give wide and general publicity regarding the subject of which notice is required to be published." The same case holds that the fact that a newspaper makes a specialty of some particular class of business and conveys intelligence of particular interest to those engaged in such business will not thereby deprive it of its general classification as a newspaper within the meaning of the statute. The definition of a newspaper there given is as follows: "A printed publication issued in numbers at stated intervals conveying intelligence of passing events," etc.

The paper before the court in that case contained legal notices, information regarding courts, a legal directory of the Douglas County bar, some advertisements of a miscellaneous character, literature of a general kind commonly designated "plate matter," and what purported to be information of the action of Congress, two addresses by lawyers, and a limited amount of general news of current events, although, as the court says, there was quite a dearth of the latter. The court held that such a paper came within the terms of the statute.

In the case of *Lynn v. Allen*, 145 Ind. 584, 44 N. E. 646, 33 L. R. A. 779, 57 Am. St. Rep. 223, the question arose as to the sufficiency of a publication in the *Daily Reporter*, a paper published in the city of Indianapolis in the state of Indiana. Its circulation, as stated by the court, was among judges, lawyers, bankers, collection, and commercial agencies, real estate dealers, merchants, manufacturers, and other professional and business men to the extent of about 550 copies in the city of Indianapolis, and outside of said city and throughout the state of about 2,500 copies. Its news consisted primarily of legal matters, including proceedings of the Supreme Court and Appellate Courts of the state, the various federal, state, county, and city courts sitting in Indianapolis, the trial calendars of the various courts, an account of new suits filed, proceedings of the board of public works and other matters relating to street improvements, a list of deeds filed in the recorder's office of the county, mortgages, liens, etc. Such a paper was held to be one publishing intelligence of a general character. In its opinion the Supreme Court of Indiana further says: "By a newspaper of general circulation the Legislature certainly did not intend a newspaper read by all the people of the county. As a matter of fact, every newspaper is, in greater or less degree, devoted to some spe-

cial interest. No one, however, would claim that because a newspaper should, for example, be the organ of a certain political party and especially devoted to the interests of such party it would not therefore be a newspaper of general circulation. Yet such a newspaper is to a large extent read only by the members of the political party whose doctrines are advocated or expounded in its columns."

A similar case was before the Supreme Court of Michigan in *Lynch v. Judge of Probate*, 101 Mich. 171, 59 N. W. 409, 24 L. R. A. 793, 45 Am. St. Rep. 404. It was there held that the Wayne County Legal News, a newspaper published weekly in the city of Detroit, while devoted primarily to the interests of the legal profession and the dissemination of legal news, containing an account of the proceedings of the Supreme Court of the state of Michigan, Wayne county circuit court and other courts of the city of Detroit, notices of future proceedings in said courts, opinions of the courts of the United States and other states, also of other counties in Michigan where the same were of interest to the legal profession or to the general public; also personal items of general interest and notices of passing events, records of real estate transfers and mortgages, chattel mortgages, bills of sale and general advertisements, circulating among judges, lawyers, bankers, brokers, real estate agents, merchants, and business men and containing items of interest to all of them, constituted a newspaper of general circulation within the meaning of the Revised Statutes of that state.

In the late case of *Hesler v. Coldron*, 29 Okl. 216, 116 Pac. 787, the Supreme Court of Oklahoma had before it for adjudication questions almost identical with those presented by the case at bar. Section 4006 of the Statutes of Oklahoma reads: "No legal notice, advertisement or publication of any kind required or provided by any of the laws of the territory of Oklahoma to be published in a newspaper shall have any force or effect as such unless the same be published in a newspaper of the county having general circulation therein and which newspaper has been continuously and uninterruptedly published in said county during the period of fifty-two consecutive weeks prior to the first publication of the notice or advertisement."

The court in that case says that the testimony is undisputed, and proves that the Daily Legal News has been published since 1903 and more than 52 weeks prior to the publication referred to; that at the time the publication in question was running and for one year prior thereto it had a circulation of from 205 to 215 among bankers, merchants, lawyers, real estate agents, insurance agents, wholesale merchants, hard-

ware merchants, physicians, and almost every class of business in the county; that it circulated in almost every town in the county; that it was so circulating for one year prior to the 1st of October, 1908; that in addition to items of legal news it carries a list of the real estate transfers of each day, the mortgages, both real and chattel, appointments of agents, powers of attorney filed in the register's office, marriage licenses, building permits, charters from the secretary's office at Guthrie, also news items of general interest. It carries besides court proceedings short telegraphic dispatches of general interest; that of the four copies of the paper introduced in evidence one contained a telegraphic dispatch concerning the Cooper trial at Nashville; one concerning President Castro of Venezuela, and one concerning the illness of Gov. Lillie; and then held that such evidence discloses that the publication in question was one of general circulation in the county and fell squarely within the terms of the statute, reversing the judgment of the lower court and remanding the case for a new trial.

We think that the news items referred to in this opinion as having been published in the Daily Recorder are matters of local interest to the people of Sacramento and also constitute intelligence of a general character within the meaning of the language used in the section of the Code defining newspapers. Practically all classes of people are more or less interested in court proceedings and in the instruments which are filed from day to day in the county recorder's office, building permits and proceedings of bodies constituting a city's government. The paper in question contains such news items without any unnecessary verbiage, and is of that character of paper to which one would naturally look for information concerning affairs of local intelligence of a general character affecting the business and welfare of Sacramento county.

Being of the opinion that the Daily Recorder is a paper of general circulation as defined by section 4460 of the Political Code, and that the findings of the trial court are contrary to the evidence as contended for by appellant, the judgment of the lower court is hereby reversed, and the cause remanded for a new trial.

We concur: CHIPMAN, P. J.; BURNETT, J.

SECTION 2.—PLACE OF PUBLICATION

VILLAGE OF TONAWANDA v. PRICE.

(Court of Appeals of New York, 1902. 171 N. Y. 415, 64 N. E. 191.)

This is an action of ejectment to recover the possession of real estate, the title to which was claimed by the plaintiff under a tax deed. Notice of the sale under the tax foreclosure proceeding was published in a paper published in Buffalo. The defendant contends that the notice was invalid, in that under the law it should have been published in the Tonawanda Herald.

BARTLETT, J.⁴⁵ * * * As to the second ground, that publication of the notice of sale on June 18, 1896, was made in the Buffalo Courier, while the act of 1892 required it to be printed in a paper published in the village of Tonawanda, if there was one, is invalid on the ground that such paper was published in the village of Tonawanda: The notice of April 27, 1892, for persons interested to appear before the board of trustees and make objections, if they had any, to the improvement, was published in a paper called the Tonawanda Herald. At that time this paper was published in the village of Tonawanda. In 1896, when it became necessary to publish the notice of sale, the situation was materially changed in regard to the place in which this newspaper was published. The finding on this point in substance is that prior to the time of this publication the Tonawanda Herald had discontinued its business in the village of Tonawanda, and removed all type and forms to North Tonawanda, which is no part of the village of Tonawanda, and having a separate post office. The papers for the village of Tonawanda subscribers were brought over from North Tonawanda, and mailed in the village. It is further found as follows: "Said newspaper was dated at both Tonawanda and North Tonawanda, but the newspaper was completely prepared for distribution in North Tonawanda." The trial court held that, notwithstanding these facts, the paper was, as matter of law, published in the village of Tonawanda, and the notice of sale should have been published therein, and not in the Buffalo Courier.

We are of opinion that this decision was erroneous, and that the newspaper in question was not, as matter of law, published in the village of Tonawanda. This point was decided

⁴⁵ Parts of the opinion are omitted.

in *Leroy v. Jamison*, 3 Sawy. 386, Fed. Cas. No. 8,271, in an opinion written by Mr. Justice Field of the United States supreme court. That was an action to recover the possession of certain real property in the county of Santa Barbara. The statute required that a certain notice must be published in a paper where the place of its publication was nearest the land involved in the litigation. It was, as matter of fact, published in a paper called the Santa Barbara Gazette. It appeared that this paper was printed in the city of San Francisco, several hundred miles distant from the county of Santa Barbara, and was sent down into that county for distribution. It was held that the place where a paper is first issued—that is, given to the public for circulation—and not the place where it is subsequently distributed, is to control in determining where it is published. Mr. Justice Field said: "In one sense, a paper is published in every place where it is circulated, or its contents are made known. But it is not in that general sense that the language 'place of publication' in the statute is used. That language refers to the particular place where the paper is first issued; that is, given to the public for circulation. Nearly all the great dailies published in the city of New York are distributed in different part of the country. Large packages of these papers are daily made up and immediately transmitted to California, where the packages are opened, and the papers distributed. A large number of them in this mode, no doubt, find their way to the county of Santa Barbara. Yet it would do violence to our apprehension of the term to say that these papers are published in Santa Barbara in the sense of the statute. No one so understands the term in ordinary parlance, and it is not used in the statute in any technical sense." We regard this as a correct exposition of the law of publication, and hold that the notice of sale, as published in the Buffalo Courier, was regular. * * *

SECTION 3.—TEST OF A PAPER'S POLITICS

PEOPLE ex rel. ELMIRA ADVERTISER ASS'N v. GORMAN et al.

(Supreme Court of New York, Special Term, 1915. 155 N. Y. Supp. 722.)

KILEY, J. The petition of the petitioner in the above-entitled matter was verified on the 15th day of April, 1915. The motion was brought on for argument at a term of this court

held in the city of Elmira April 26, 1915. The petitioner asks for a writ of mandamus requiring the board of supervisors to meet, convene, and designate the petitioner, the Elmira Advertiser Association, as the paper fairly representing the Republican party, and alleging that its paper supported the principles of the Republican party and its nominees in the state of New York and Chemung county, at the last general election. The reason for the petition, and the proceedings founded thereon, is that the Republican members of the board of supervisors of Chemung county, in the month of December, 1914, designated the Elmira Star-Gazette, published at Elmira, Chemung county, N. Y., as the paper that "more nearly advocates the principles of the Republican party than any other newspaper published in said county, and during the last general election supported more of its candidates than any other newspaper."

It was disclosed by the answering affidavits used upon the argument and presentation of this motion, that hostility existed between the petitioner and the Republican organization of Chemung county to an extent that suggests some reason must have existed for that hostility. There are 19 Republican members of the board of supervisors of Chemung county, and they unanimously resolved that the petitioner no longer supported the principles of the party to which they belonged and in whose interest they were called upon to act by the provisions of the statute.

It appears that the principal owner of the petitioner is Mr. Milo Shanks, of Elmira, N. Y., and that he owns the controlling interest in said paper and is its publisher. The affidavits, presented in opposition to the petitioner's motion, contain statements claimed to have been made by the publisher to the effect that he had joined another party and did not intend to support the candidates of the Republican party, and that the other party, to whom he was about to give allegiance, was going to sweep the state; that other party was one founded by ex-Governor Sulzer, known as the "Guardians of Liberty."

In answering this allegation, Mr. Shanks denies that he made this statement, and swears that he is a Republican. This portion of the matter furnished on the contested questions at issue is referred to here solely for the purpose of saying that it is not pertinent to the issue and can have no bearing upon the questions considered. It leads to the further observation that a man has a right to belong to any party that represents his ideas and way of thinking, and he may conduct and publish a Republican newspaper, providing he supports the policies and candidates of that party.

It was intimated upon the argument that, in the final an-

alysis, what a newspaper itself disclosed was its policy during the last campaign, as to its support of the policies and candidates of the Republican party, would be the strong force in determining the policy of that paper. To that end the court directed the contending parties, to wit, the petitioner and the Elmira Star-Gazette, to which it was opposed, to furnish to the court files of their respective papers for a period covering the campaign months, that a personal examination might be made. Acceding to that request, the respective parties have filed with the court copies of their several issues from a time previous to primary day, in September, 1914, until after election day of the same year. A careful perusal of the petitioner's newspaper forces upon the court the feeling that, if the only support the Republican party had in Chemung county came from petitioner's paper, it was either unworthy of support, or that honest support, by a paper claiming to be a Republican paper, was knowingly, wantonly, and maliciously withheld. No attempt will be made here to determine which reason impelled the absence of support to the Republican party from the columns of the petitioner's paper: A few instances will be cited that seem to reflect the attitude of the Advertiser towards the Republican party, its principles, and its nominees, and in so doing again it is asserted that no attempt will be made to give the reason for such attitude toward its party by a paper claiming to be a Republican newspaper and entitled to the emoluments such relationship affords.

In going over the files of the paper of the petitioner, to wit, the Elmira Advertiser, I was unable to determine from that paper who were the candidates of the Republican party of either state or county during the campaign of 1914. Nowhere in that paper was published a list of the Republican candidates. On the other hand, the list of the Prohibition candidates, upon which ticket Mr. Shanks, publisher and editor of the petitioner, was running for Congress, was, almost daily, published during the interim between primary day and election day. The Progressive party had a page, or a column, in petitioner's newspaper for its use. I think it may be fairly stated that in practically every instance where the Republican party, as a party, was alluded to or mentioned by the Advertiser, or in the presence of Mr. Shanks, as published in the Advertiser, its portent, and somewhere in its context, there was contained ridicule and disparagement for the Republican party and some of its candidates and principles. It is true that Mr. Shanks claims that, notwithstanding this condition of affairs, he was and still is a Republican, and that the petitioner was and still is a Republican newspaper. The

hostility seemed to be directed, in the main, against the Republican organization. The appeal made to the voters was to leave the Republican party, and its organization, and to support the Prohibition party and its candidates.

Section 20 of the County Law (Consol. Laws, c. 11) must be read and considered in conjunction with the other provisions of the statute that provide that a party can only act through an organization. Even though various members of different parties conceive that the organization with which they have hitherto affiliated, in its principles and in the personnel of its candidates, does not come up to their conceived standard of excellence, and that it is time for them to make a stand for those principles, even then, they must do so through organized effort in order to comply with the statute. And I think it may be fairly said that the petitioner sought to and was supporting other principles and candidates than those of the Republican party.

The editor and publisher of the petitioner and Hon. W. E. Knapp were running as candidates for Congress and county judge respectively on the same ticket, viz. the ticket of the Prohibition party. For instance, in the columns of petitioner's newspapers, within the period above referred to, I read of a mass meeting at which Mr. Shanks, the publisher and proprietor of the petitioner, was one of the speakers, and Hon. Wilmott E. Knapp, above referred to, was another of the speakers. Mr. Knapp defined himself as an independent Republican, and then defined what an independent Republican was, viz., that an independent Republican was a great deal better than an ordinary Republican, just as good as a good Democrat and a good Progressive, and the force of his argument following this declaration was to the effect that a new dispensation had come, that new standard bearers had taken the lead, that the policy, candidates, and battle cry had changed. The editor of the petitioner did not demur, and by his silence, as speaker on that occasion, concurred.

This is not observed with any spirit of criticism, but rather as showing that the Advertiser had at least taken up the support of the party that by its utterances and its writings claimed to have been better than all other parties, and to further observe that a party speaks through its candidates and its policies. The Advertiser had a right to assume the attitude it did with reference to the party policy it determined to espouse or oppose.

That the publisher and proprietor of the petitioner, and the force controlling and shaping its policies, regarded the party with which he was affiliated, and on whose ticket he was running, at that time, in the light above referred to, and

that his paper was no longer supporting the Republican party, may be inferred from the following quotation on its editorial page: "The bung-hole Democrats and their allies, the bung-hole Republicans, are astounded that they should be put to such an effort to control the politics of this district. They have not yet realized what a revolt there is among the people of all parties against further domination of our politics by the boss element and the fifty-fiftyites."

This editorial was written after a majority of the enrolled voters of the Republican party of Chemung county, and in the congressional district of which Chemung county is a part, had named its candidates. The Advertiser was leading a revolt, and in its reprehensible language here used referred to a majority of the Republican party voters, and which petitioner now claims is the party with which it now and ever has been affiliated. Let it be distinctly understood that Mr. Shanks is not charged with writing that editorial, or using that language. Indeed, I would be sorry to learn that he wrote it; but as it appeared in the editorial column of the Advertiser, after the primary day and before election day, the petitioner must appreciate that it must assume the responsibility for it.

A paper that uses the foregoing language with reference to a majority of the Republican party voting at a primary cannot well expect a court of justice to tie the Republican party to such a paper by force of law, thereby enabling it to put the knife into its vitals at close range, and at the same time hold it should be paid for so doing. Let no one lull himself into the false security that public money, going to parties as such, is free from the flavor of patronage. That paper which most faithfully, energetically, and widely upholds and distributes the party doctrine is entitled to the benefits accruing.

The Republican members of the board of supervisors, after consideration, resolved that the Star-Gazette more nearly supported the principles, policies, and candidates of the Republican party than did the petitioner, and designated that newspaper to publish the Session Laws, concurrent resolutions, etc.

An examination of the files of the Star-Gazette during the last campaign discloses that its attitude towards all candidates and parties was respectful; that the Republican party and its candidates occupied as much, if not more, space than did the candidates of any other party. That speeches of Republican candidates, notably Hon. Charles S. Whitman, candidate for Governor, were liberally published. It is an independent newspaper. It openly opposed such candidates as

it conceived to be candidates of the dominant organization of the Democratic party, and through the Republican candidate for Governor stated the principles of the Republican party in a very short paragraph, preceded by large headlines. The following is referred to: "My whole record, during my public life, shows conclusively that I have consistently and uniformly disregarded all questions of race or creed, having in mind only efficiency and integrity in the public service."

The underlying principle of every party that does succeed, or may hope to succeed, is based upon the last two lines of the above declaration, to wit: "Having in mind only efficiency and integrity in the public service."

There is no intimation in the columns of the petitioner that the sentence quoted represents the principles of the Republican party. The petitioner does, however, in substance many times in its columns during the campaign claim it as representing the policy of the Prohibition party.

If the time has not come, it is fast approaching, when courts will cease to upset the decision, after deliberation, reached by a legislative body upon a subject submitted to it by statute, and over which it has general control. Section 20 of the County Law requires the Republican members of the board of supervisors, as applied to this case, to designate a newspaper. That duty is a primary duty. It then directs those members how to designate it. That is a secondary duty, and as Judge Werner says, in *People ex rel. Bonheur v. Christ*, 208 N. Y. 14-15, 101 N. E. 846, that this is a general power given to those members, and with that general power there goes an implied right to say what paper, within their jurisdiction, more nearly complies with the provisions of the statute; and unless a fraud is shown on the part of the members of the board of supervisors, or it is obvious that they have violated the provisions of the statute, their decision in this regard should not be disturbed. I am of the opinion that, in the exercise of sound discretion, the granting of a writ of mandamus in this matter should be denied.

Petition dismissed, with costs to the respondents.

SECTION 4.—THE ENGLISH LANGUAGE REQUIREMENT

PERKINS v. BOARD OF COM'RS OF COOK COUNTY et al.

(Supreme Court of Illinois, 1916. 271 Ill. 449, 111 N. E. 580, Ann. Cas. 1917A, 27.)

This was a suit to enjoin the sale of bonds on the ground, among others, that the publication of the ordinance, which authorized the issue, in the *Staats-Zeitung*, a newspaper published in the German language, was not a publication according to law, notwithstanding the ordinance itself was published in the English language.

CRAIG, J.,⁴⁶ delivered the opinion of the court. * * * As to the character of the newspaper in which such publication may be made, section 18 of the Schedule of the Constitution of 1870 provides that: "All laws of the state of Illinois, and all official writings, and the executive, legislative and judicial proceedings, shall be conducted, preserved, and published in no other than the English language."

In *City of Chicago v. McCoy*, 136 Ill. 344, 26 N. E. 363, 11 L. R. A. 413, we held that this provision of the Constitution was permanent in its character, scope and operation and applied to all official writings subsequent to the adoption of the Constitution; that ordinances of a city are local laws and in a sense laws of the state, and as such within the spirit and intention of this constitutional inhibition. In *Attorney General v. Hutchinson*, 113 Mich. 247, 71 N. W. 514, a statute required notice of the meeting of the board of review to be published in a newspaper published in the city. In that case the notice was published in a Swedish paper, and in passing upon the sufficiency of such publication the court said:

"The provision does not mean newspapers printed in a foreign language. The English language is the recognized language of this country, and whenever the law refers to publication in newspapers it means those published in the language of the country. In *Graham v. King*, 50 Mo. 23 [11 Am. Rep. 401], it was held that 'when notices are to be published in a paper, an English paper is always intended unless it was expressed to be otherwise.' This case was approved in *Schaale v. Wasey*, 70 Mich. 419, 38 N. W. 317,

⁴⁶ The statement of facts is rewritten and parts of the opinion are omitted.

where a notice published in English but in a newspaper published in a foreign language was held void."

We think the rule there announced is the one which conforms to the spirit and intent of our Constitution and laws. The object of requiring publication of such ordinances in a newspaper having a general circulation in the municipality in which it is to become effective is in order that its provisions may become known to the inhabitants of such municipality. The primary meaning of the word "publish" is "to make known." 32 Cyc. 259; *State v. Orange*, 54 N. J. Law, 111, 22 Atl. 1004, 14 L. R. A. 62.

A notice or ordinance published in the English language in a newspaper printed in a foreign language cannot be said to be "published," in the sense in which that word is used in the Constitution and laws of this state. Ordinarily such publications are taken and read only by those who understand and read the language in which the publications are printed and who do not readily understand and read the English language. If we were to hold that it is proper to print such a notice in the English language in a newspaper published in the German language, we cannot perceive why it would not be proper to publish it in a newspaper published in some other foreign language, such as the Italian, Spanish, or French language, which would be read but by a small portion of the inhabitants of that community and but a few of whom understand the English language. For these reasons we must hold that the ordinance in question was void for want of due publication, and the bonds issued pursuant thereto are illegal and void, and that the tax levied for the purpose of paying the same should be enjoined. * * *

SECTION 5.—RATE FIXING

HOFFMAN v. CHIPPEWA COUNTY.

(Supreme Court of Wisconsin, 1890. 77 Wis. 214, 45 N. W. 1083, 8 L. R. A. 781.)

This was an action to recover the statutory rate for printing a delinquent tax list, notwithstanding the making of a contract to print it for a less rate.

COLE, C. J., delivered the opinion of the court:⁴⁷ * * *

The language of the statute is certainly clear and explicit

⁴⁷ Parts of the opinion are omitted.

on the subject. It is even mandatory in form, and says that "the printer who shall publish the list and notice of the time when the redemption of lands sold for the nonpayment of taxes will expire shall receive thirty cents for each lot or tract of land in such list, for all the insertions." Rev. St. § 1174. Thus the statutes expressly prescribe the fees which the printer shall receive, and the county clerk had no authority to make a contract which changed them. The statute, indeed, does not give the clerk any power to contract for the publication of the list where the number of descriptions in the list does not exceed 3,000. He is required to cause the list to be published as the statute prescribes (section 1170)—that is, he can select or designate the paper, but the compensation for the service has been fixed by the legislature. But, where the number of descriptions in the advertised list exceeds 3,000, there the county clerk is required to let by contract the publication to the lowest bidder, in the same manner, and with like conditions and limitations, as the county treasurer is authorized to contract for the publication of lists of lands for delinquent taxes for sale. Section 1173.

In the case at bar, it is insisted that the contract which the clerk attempted to make with the plaintiffs amounted to nothing more than the designation of the paper in which the list should be published, but did not bind or compel the plaintiffs to do the work for less than the fees fixed by law. The principle of law relied on is that, when the compensation of a party performing services for the state is fixed by statute, it cannot be reduced by the officer or person by whom he is employed; and, since here the statute expressly declares that the printer shall receive 30 cents for each lot or tract of land in the advertised list, the compensation could not be diminished by any arrangement or contract which the county clerk might make in respect thereto. This contention of counsel is sustained by a number of well-considered decisions. *Goldsborough v. U. S.*, Taney, C. C. 80; *People v. Board of Police*, 75 N. Y. 38; *People v. French*, 91 N. Y. 265; *Kehn v. State*, 93 N. Y. 291; *Riley v. Mayor*, 96 N. Y. 331. The following cases have likewise a bearing on the question we are considering: *Beal v. Supervisors*, 13 Wis. 501; *State v. Purdy*, 36 Wis. 213; *State v. Mayor*, 15 Lea, 697; *Edmondson v. Jersey City*, 48 N. J. Law, 121, 3 Atl. Rep. 120. We have already stated that the clerk had no power to enter into any contract for the publication in this case. He was only authorized to select the paper in which the publication should be made.

The only doubt I have had in the case grows out of this fact: The answer shows that the plaintiffs filed with the

county clerk an offer, in writing, to print the delinquent list in their paper for three cents for each description, and tendered a bond for the faithful performance of the work. On the good faith of this offer or proposition, the clerk doubtless entered into the contract which he made with them. While it is clear that he had no authority in law to make such a contract, still I have had some doubt whether they were not bound to stand by the proposition which they made. It is true this was for much less than the rate of compensation fixed by the statute. But could they not waive a provision for their benefit? And, having voluntarily done so, is not the offer or proposition binding upon them? But to this view it is answered that the doctrine of waiver or estoppel has no application to the case, and cannot be invoked to aid the defendant county; that the law does not sanction the principle that an officer shall make a contract to reduce the compensation fixed by statute for services. In some of the cases above cited the facts showing waiver were quite as strong as in this case, but the courts gave no effect to them. In *People v. Board of Police* it is said: "There is no principle upon which an individual appointed or elected to an official position can be compelled to take less than the salary fixed by law. The acceptance and discharge of the duties of the office after appointment are not a waiver of the statutory provision fixing the salary thereof, and does not establish a binding contract to perform the duties * * * for the sum named. The law does not recognize the principle that a board of officers can reduce the amount fixed by law for a salaried officer, and procure officials to act at a less sum than the statute provides, or that such officials can make a binding contract to that effect. The doctrine of waiver has no application to any such case, and cannot be invoked to aid the respondent." The same principle is recognized and enforced in *Kehn v. State* and *Riley v. Mayor*, *supra*, and the reason for the rule applies in full force here.

For reasons satisfactory to the legislature, it saw fit to prescribe the amount of compensation which the printer should receive for the service. Whether it was thought that this compensation would secure better service, or greater faithfulness in the execution of the work, we cannot tell. It is sufficient to say that the law is so enacted, and the courts must conform to it. * * *

SECTION 6.—THE OFFICIAL NEWSPAPER

SHELDEN v. FOX et al.

(Supreme Court of Kansas, 1892. 48 Kan. 356, 29 Pac. 759, 16 L. R. A. 257.)

HORTON, C. J., delivered the opinion of the court.

On and prior to the 9th day of January, 1889, and at this time, Alvah Shelden was and is the publisher of the Walnut Valley Times, a weekly newspaper printed and published in El Dorado, in Butler county, in this state, and having general circulation therein. On the 9th day of January, 1889, the board of county commissioners of Butler county, then composed of J. K. Skinner, B. H. Fox, and A. O. Rathburn—the last named being the chairman of the board—at a regular session designated the Walnut Valley Times as the official paper of Butler county, and directed that the county printing for the next two years be given to that paper, commencing on the 10th of January, 1891, and ending on the 1st of January, 1893. Subsequently a written contract was entered into between the board and Alvah Shelden, the publisher of the Walnut Valley Times. At the time of the execution of the contract Shelden made to the state of Kansas a bond in the sum of \$500, conditioned for the faithful performance of his duties devolving upon him as county printer, which was approved and accepted by the board, and filed with the county clerk.

Shelden continued to do the county printing, under the terms of the contract, until the 26th of January, 1892, when the board of county commissioners, then composed of B. H. Fox, John Ellis, and H. M. Brewer—the first named being the chairman—designated by a majority vote the Industrial Advocate as the official newspaper of Butler county. On February 8, 1892, the order of the board was spread upon the journal by the county clerk. The publisher of the Industrial Advocate entered into a contract with the board for the county printing, and executed a bond, which was approved by the board. Since the 8th day of February, 1892, the board of county commissioners has refused to recognize the Walnut Valley Times as the official paper of Butler county, and has directed the county clerk to notify Shelden, the publisher of the Walnut Valley Times, that the Industrial Advocate had been designated as the official paper of Butler county until the further order of the board. Shelden objected to this, and demanded that he be permitted to do all the county printing

of Butler county. This has been refused. On the 15th day of February, 1892, Sheldon commenced this proceeding in this court for a peremptory writ of mandamus to compel the board of county commissioners of Butler county, and the clerk thereof, to allow him, as the owner and publisher of the Walnut Valley Times, to do all the county printing, job work, etc., until January 1, 1893.

The principal question in the case is whether a board of county commissioners may designate an official newspaper of the county for a term of two or more years. On the part of the plaintiff it is alleged that this may be done, and on the part of the defendants this is denied. Paragraph 1655, Gen. St. 1889, provides that "the boards of county commissioners of the several counties of this state shall have exclusive control of all expenditures accruing either in the publication of delinquent tax lists, treasurers' notices, or county printing." Under this section the boards of county commissioners of the several counties have the legal right to designate the paper in which the delinquent tax lists shall appear. Paragraph 1710, *Id.*; *Wren v. County of Nemaha*, 24 Kan. 301. When a paper is designated by a board of county commissioners, it becomes the official newspaper of the county.

In *Fuller v. Miller*, 32 Kan. 130, 4 Pac. Rep. 175, it was said: "We think section 26, construed in connection with amended section 3, means that, on the second Monday of January after each general election at which a commissioner has been elected, the board, as an organized body, is dissolved, and the office of chairman is vacant, and, before the commissioners can transact any county business, other than to elect a chairman, or fill a vacancy in the office of a commissioner, the board must be again organized, and such organization is effected, and the board an organized body for the purposes of its creation, as soon as the commissioners elect a chairman. By this construction the sections of the Constitution and statute under consideration are in harmony. Then it follows that a chairman is to be elected in each year on the second Monday of January, or within 30 days thereafter, and will hold his office until the ensuing second Monday of January, and that the term of office of the chairman of a board of county commissioners is from the day of his election to that office until the next ensuing second Monday of January."

As the Legislature has provided that the boards of county commissioners of the several counties of the state shall have exclusive control to designate a paper, and to control the county printing, this, of course, means that the board of county commissioners of each county has that power. Therefore, as the board of county commissioners of a county, after one

year, is dissolved as an organized body, such board ought not to have the control of the county printing after one year, or for an indefinite term of years. Each board of county commissioners of each county has authority and responsibility in designating the official newspaper of the county, and, as a necessary result, in providing for the county printing. If the board of county commissioners of a county could tie the hands of subsequent boards in designating the official newspaper and in contracting for county printing, it might tie the hands of subsequent boards for several years—at least for what would be a reasonable time; and it would be difficult to determine what, under all the circumstances of the case, would be a reasonable time. It follows logically that the board of county commissioners of a county must be limited to one year, or until the body is dissolved, or else its power is unlimited in this respect, and it may designate a paper as the official newspaper of the county for two, three, or more years—at least, for a reasonable time, which is almost indefinite. See *Bank v. Peck*, 43 Kan. 643, 23 Pac. Rep. 1077; *Bank v. County Com'rs*, 43 Kan. 648, 23 Pac. Rep. 1079.

It appears from the pleadings in this case that it has been the practice in Butler county for a newspaper to be designated by the board of county commissioners of that county as the official paper for the period of two years; and therefore, in this case, the board of county commissioners, in 1891, followed the usual practice in designating an official newspaper. It is the practice, however, in most of the counties of the state, for the boards of county commissioners to designate the official newspapers of the counties for the period of one year only. The latter practice seems to us to conform to the constitution and statutes of the state. To avoid complications or other troubles, the designation of the official newspaper should be made as early in each January, after the board is organized, as is convenient for action to be had.

The peremptory writ will be denied, with costs [i. e., the right of the Walnut County Times to continue as the official paper for the second year is denied.]

SECTION 7.—DETERMINATION OF CIRCULATION

PEOPLE ex rel. PRESS PUBLISHING CO. v. MARTIN et al.

(Court of Appeals of New York, 1894. 142 N. Y. 228, 36 N. E. 885, 40 Am. St. Rep. 592.)

This is a proceeding to review a determination of the board of police commissioners of the city of New York, designating certain newspapers for the publication of election notices. The complainant, called the relator, is the publisher of the New York World. In the proceeding the following facts appeared: Before the selection was made an affidavit was presented to the board on behalf of the relator which stated that the circulation of the World exceeded by many thousands that of any other newspaper published in the United States, and that it was ready upon demand to submit its books to the police commissioners in substantiation of its claims. No other communication was had between the relator and the board until after the selection was made, whereupon the relator presented to the board an affidavit to the effect that the World in the city of New York exceeded by 75,000 that of the newspapers selected, and requested permission to present evidence substantiating its claims. This request the board denied, and refused to reconsider its decision.

EARL, J. In the Election Law (Laws 1892, c. 680, § 61) it is provided that, at least six days before an election to fill any public office, the board of police commissioners of the city of New York shall cause to be published in not less than two, nor more than four, newspapers within such city, a list of all nominations for candidates for offices to be filled at such election and that "one of such publications shall be made in a newspaper which advocates the principles of the political party that at the last preceding election cast the largest number of votes in the state; and another of such publications shall be made in a newspaper which advocates the principles of the political party that at the last preceding election cast the next largest number of votes in the state. The clerk or board, in selecting the respective papers for such publication, shall select those which, according to the best information he can obtain, have the largest circulation within such county or city. In making additional publications the clerk or board shall keep in view the object of giving information, so far as possible, to the voters of all political par-

ties; and in no event shall additional publications be made in two newspapers representing the same political party."

The relator is right in claiming that the police commissioners, in designating the newspapers, act judicially; that their determination may be reviewed by writ of certiorari; and that the relator had sufficient interest to institute this proceeding. And while the time has long since passed when any decision in this matter can have any practical, efficient operation, we will, in view of the public importance of the questions involved, overlook that circumstance, and proceed to the determination of the matter upon its merits, upon the facts as they appear in this record.

The police commissioners cannot, under this act, arbitrarily designate the newspapers, without making any inquiry, or any effort to obtain the best information, as to their circulation. They must act in good faith, and seek for information as to the circulation of the newspapers; and, in making the designation, they must act according to the best information they can obtain. But they are not bound to resort to any particular evidence, nor to give the various newspaper representatives a formal hearing. They can receive affidavits, examine books, or make other inquiries satisfactory to them, for the purpose of ascertaining which of the newspapers has the largest circulation within the city. If they are furnished with formal proof by the representatives of any newspaper, they should receive it, and act upon it. If evidence, not open to suspicion or doubt or question, is furnished to them, showing that any particular newspaper has the largest circulation, they should receive and act upon such evidence, giving to it its proper force and effect. In other words, they should act fairly, seeking for the best information to guide them in the exercise of their judicial discretion in the selection of the newspaper under the act. All sources of information are open to them, as they are open to assessors of property for taxation, who are to proceed upon diligent inquiry, and the best information they can obtain. 2 Rev. St. (7th Ed.) pp. 990, 991, 994; *People v. Board of Trustees of Ogdensburgh*, 48 N. Y. 390.

Now, what facts have we here? At the time the police commissioners designated the newspapers, they had not been furnished with any evidence by the relator that the *World* had a larger circulation in the city of New York than any other newspaper. The entire circulation may have been larger than that of any other newspaper in the whole country, and yet its circulation may not have been so large in the city of New York as some other newspaper published there. The offer of the relator on the 25th of October, then, to show that

the circulation of the *World* in the city of New York, was larger than of any other newspaper, came too late, as the designation had then already been made. There is absolutely nothing in this record showing that the determination of the police commissioners was erroneous, or from which we can determine that they did not exercise their jurisdiction regularly and rightfully.

We are bound to take their return as true, and in it they allege that, in designating the papers; they selected those which, according to the best information they could obtain, had the largest circulation in the city of New York; and thus they certified that they had actually and literally complied with the statute. If the return was evasive, or not sufficiently full, they could have been compelled, under section 2135 of the Code, to make a further return. They could have been required to return what action they took, and what information they sought and obtained, in reference to the circulation of the newspapers. But, instead of asking for a further return, the relator was content to stand upon the return as made. We are bound to take the return here as absolutely true. If it be false, the relator has its remedy by an action against the police commissioners for making a false return, in which action it can recover its damages suffered in consequence thereof. *People v. Board of Fire Com'rs*, 73 N. Y. 437.

Therefore, because we cannot, in this record, discover any error in the proceedings or determination of the board of police commissioners, the order of the general term should be affirmed, with costs. All concur.

Order affirmed.

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